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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

TIMOTHY S. DUNCAN
PRIVATE FIRST CLASS, UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the military's rule for severance of offenses deprived Petitioner of his right to a fundamentally fair trial guaranteed by the Due Process Clause of the Fifth Amendment.

II. Whether the military's narrower rule for severance of offenses, as compared to FED.R.CRIM.P. 14, violates the Equal Protection component of the Fifth Amendment and Article 36(a), UCMJ.

III. Whether the Court of Appeals erred by holding that a judge may instruct the members on eligibility for parole contrary to the plain language of Rule for Courts-Martial 1005(e)(4).

IV. Whether the Court of Appeals erred in relying upon the presumption that members can and will follow a judge's instructions to ignore highly prejudicial information, alone, to conclude that denial of severance and instruction on parole were harmless.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATUTORY PROVISIONS 2

RULES FOR COURTS-MARTIAL 2

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 7

REASONS FOR GRANTING THE PETITION 10

ARGUMENT 11

CONCLUSION 30

APPENDIX 1a

United States v. Duncan, 53 M.J. 494 (2000) 1a

United States v. Duncan, 48 M.J. 797 (N.M.Ct.Crim.App 1998) 13a

United States v. Gambles, No. 9600352 (N.M.Ct. Crim.App. October 3, 1997) 34a

TABLE OF AUTHORITIES

United States Supreme Court Cases

Bolling v. Sharp, 347 U.S. 497 (1954) 20
City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 20
Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 27
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 20
Kotteakos v. United States, 328 U.S. 750 (1946) 19
Krulewitch v. United States, 336 U.S. 440 (1949) 27
Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) 27
Middendorf v. Henry, 423 U.S. 25 (1975) 21
Richardson v. Marsh, 481 U.S. 200 (1987) 27
Strickland v. Washington, 466 U.S. 668 (1984) 20
United States v. Lane et al., 474 U.S. 438 (1986) 19, 26
United States v. Scheffer, 523 U.S. 303 (1998) 11, 23

United States Court of Appeals for the Armed Forces

United States v. Boone, 42 M.J. 308 (1995) 23
United States v. Boudreaux, 35 M.J. 291 (C.M.A. 1992) 30
United States v. Duncan, 53 M.J. 494 (2000) ..... passim
United States v. Greaves, 46 M.J. 133 (1997) 23
United States v. Griffin, 25 M.J. 423 (C.M.A. 1988) 23
United States v. Haagenson, 52 M.J. 34 (1999) 29
United States v. Hilow, 32 M.J. 439 (C.M.A. 1991) 29
United States v. Southworth, 50 M.J. 74 (1999) 19

United States Circuit Courts of Appeals Cases

Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964) 14
United States v. Alexander, 135 F.3d 470 (7th Cir. 1998) 19
United States v. Archer, 843 F.2d 1019 (8th Cir. 1988) 15
United States v. Coleman, 22 F.3d 126 (7th Cir. 1994) 13, 21
United States v. Foutz, 540 F.2d 733 (4th Cir. 1976) 21
United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976) 15
United States v. Vest, 116 F.3d 1179 (7th Cir. 1997) 17
United States v. Werner, 620 F.2d 922 (2nd Cir. 1980) 15

United States Courts of Criminal Appeals Cases

United States v. Duncan, 48 M.J. 797 (N.M.Ct.Crim.App. 1998) 1, 6, 18, 21
United States v. Gambles, 1997 CCA LEXIS 541, No. 96-0352 (N.M.Ct.Crim.App. October 3, 1997) (unpublished) 18, 24
United States v. Knox, 46 M.J.688 (N.M.Ct.Crim.App. 1997) 27
United States v. McLaren, 34 M.J. 926 (A.F.C.M.R. 1992) 23

United States District Court Cases

United States v. Garey, 813 F. Supp. 1069 (D. Vt.1993) 15

United States Constitution

U.S. CONST., amend v 2

Uniform Code of Military Justice

Article 25(d)(2), 10 U.S.C. § 825(d)(2) 29
Article 36(a), 10 U.S.C. § 836(a) 2, 20

Other Federal Statutes

28 U.S.C. § 1259(3) 1
FED.R.CRIM.P. 8(b) 19

Rules for Courts-Martial

R.C.M. 601(e)(2), MCM (1995 ed.) 2, 19, 21
R.C.M. 906(b)(10), MCM (1995 ed.) 3, 19, 20
R.C.M. 906(b)(9), MCM (1995 ed.) 19
R.C.M. 1005(e)(4), MCM (1995 ed.) 3, 6, 22

Military Rules of Evidence

MIL.R.EVID. 403, MCM (1995 ed.) 13
MIL.R.EVID. 404(b), MCM (1995 ed.) 13

Manual for Courts-Martial

Drafters' Analysis of R.C.M. 601(e)(2), App. 21 MCM (1995 ed.) 21
Drafters' Analysis of RCM 906(b)(10), App. 21, MCM (1995 ed.) 19
MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1949 ed.), ¶*80a* 22

Treatises and Law Review Articles

8 MOORE'S FEDERAL PRACTICE § 8.05[4] 13
25 MOORE'S FEDERAL PRACTICE §614.03[1][b] (3d ed. 1999) 14
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INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES (Jonathan M. Golding & Colin M. MacLeod eds., Lawrence Erlbaum Associations, Publishers 1998) 27
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PETITION FOR A WRIT OF CERTIORARI

Private First Class Timothy S. Duncan, United States Marine Corps, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals, published at 53 M.J. 494, is found in the Appendix, *infra*, at 1*a*. The opinion of the Navy-Marine Corps Court of Criminal Appeals, published at 48 M.J. 797, is found in the Appendix, *infra* at 13*a*.

JURISDICTION

The Court of Appeals entered its judgment on August 31, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS

Article 36(a), Uniform Code of Military Justice, 10 U.S.C. § 836(a) reads in relevant part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial ... may be prescribed by the President by regulations which *shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in he trial of criminal cases in the United States district courts*, but which may not be contrary to or inconsistent with this chapter.

(emphasis added).

RULES FOR COURTS-MARTIAL[1]

Rule for Courts-Martial 601(e)(2), Manual for Courts-Martial, United States (1995 ed.) [hereinafter R.C.M. 601(e)(2), MCM (1995 ed.)] reads in relevant part:

> (2) *Joinder of offenses.* In the discretion of the convening authority, two or more offenses charged

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[1] These provisions of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.) are identical to those in the 1998 and 2000 editions.

> against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. [...]
>
> Discussion
>
> Ordinarily, all known charges should be tried at a single court-martial.

Rule for Courts-Martial 906(b)(10), Manual for Courts-Martial, United States (1995 ed.) [hereinafter R.C.M. 906(b)(10), MCM (1995 ed.)] reads in relevant part:

> (b) *Grounds for appropriate relief.* The following may be requested by motion for appropriate relief [...]*(10) Severance of offenses, but only to prevent manifest injustice.*
>
> Discussion
>
> Ordinarily, all known charges should be tried at a single court-martial. Joinder of minor and major offenses, or of unrelated offenses is not alone a sufficient ground to sever offenses. For example, when an essential witness as to one offense is unavailable, it might be appropriate to sever that offense to prevent violation of the accused's right to a speedy trial.

(emphasis added).

Rule for Courts-Martial 1005(e)(4), Manual for Courts-Martial, United States (1995 ed.) [hereinafter R.C.M. 1005(e)(4), MCM (1995 ed.)] reads in part:

> (e) *Required instructions.* Instructions on sentence shall include: [...] (4) A statement informing the members that they are solely

responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority

STATEMENT OF THE CASE

Petitioner was tried by a general court-martial at Camp Pendleton, California, on various dates between November 4, 1994 and May 8, 1995. The court-martial was composed of officer members and was convened by the Commanding General, 1st Marine Division (Rein), Fleet Marine Force Pacific, Camp Pendleton, California.

The offenses with which the Petitioner was charged arose out of two separate incidents. The first occurred on June 17, 1994 and involved a Ms. [DR]. The second occurred on July 24, 1994 and involved Ms. [AM], Mr. [JM], and Mr. [RS].

The sets of charges were very similar in that both involved violent rapes, forcible oral and anal sodomy, various other assaults, and attempted murders. In addition, the incidents occurred about one month apart and both involved the Petitioner and PFC Gambles.

Petitioner moved to sever the charges relating to Ms. [DR] and alleged to have occurred on 17 June 1994 from the charges relating to Ms. [AM] and alleged to have occurred on 24 July 1994. Record at 95.

The military judge denied the motion.[2] Record at 111. The military judge based his decision on the qualifications of military members, the fact that the administration of justice is not the military's primary business, and the benefit to the accused of unitary sentencing.[3] Record at 103, 111.

Instead, the Judge ordered the Government to address each

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[2] The military judge conceded that the motion would be granted almost automatically in a civilian court. Record at 103.

[3] In the military, a single sentence is adjudged for all offenses of which an accused is convicted. *See Jackson v. Taylor,* 353 US. 569 (1957).

of the sets of charges separately in its opening and closing statements and the presentation of the evidence. *United States v. Duncan*, 53 M.J. at 498. The military judge also gave "spillover" instructions to the members during *voir dire*, during the Government's presentation of evidence, and again before deliberations. *Id.*

Contrary to his pleas, Petitioner was convicted of Article 80, UCMJ (three specifications of attempted murder while in commission of a felony, one specification of attempted robbery, and one specification of attempted forcible sodomy); Article 81 (three specifications of conspiracy); Article 120 (three specifications of rape); Article 121 (one specification of larceny); Article 125 (six specifications of forcible sodomy); Article 134 (two specifications of kidnapping, one specification of carrying a concealed weapon, and one specification of communicating a threat). He was found not guilty of one specification alleging a violation of Article 80 (an unrelated attempted robbery) and one specification alleging a violation of Article 134 (wrongful discharge of a firearm).

During sentencing deliberations, the members submitted the following written questions to the military judge:

> (1) Will rehabilitation/therapy be required if PFC Duncan is incarcerated?
> (2) In military justice, is parole granted or are sentences reduced for good behavior? If so do these reductions apply to a "life" sentence?

Record at 2035-2037 and Appellate Exhibit CXXXIV. These were the only questions the members asked after being instructed on sentencing.

The defense objected to answering both questions and requested that the members be told that the questions were simply off limits. Record at 2040. The military judge, however, announced he would instruct on the existence of parole, list some factors affecting the exercise of parole, and then tell the members they should "not be concerned about the impact of parole." Record at

2038-2039. –The defense renewed its objection to any instruction at all. It then offered a counter-instruction that "for purposes of determining an appropriate sentence at this court-martial, you must assume that no parole or [time off for] good behavior exists," which the court rejected. Record at 2039. The military judge then gave his own instructions informing the members that parole would be available to Petitioner, even with life imprisonment. Record at 2043.[4]

Forty minutes later, the members returned with a sentence of life imprisonment, forfeiture of all pay and allowances, reduction to the paygrade E-1, and a dishonorable discharge. Record at 2044, 2046.

On March 29, 1996, the Convening Authority approved the sentence and, except for the dishonorable discharge, ordered it executed. On July 31, 1998, the U.S. Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence. *United States v. Duncan*, 48 M.J. 797 (N.M.Ct.Crim.App. 1998). On August 17, 1999, the Court of Appeals for the Armed Forces granted Petitioner review on two issues. The case was argued on December 8, 1999.

Before the Court of Appeals, Petitioner argued that the military judge had abused his discretion by instructing the court-martial members on Petitioner's eligibility for parole. Petitioner contended that the military judge's instruction, given over defense objection and contrary to R.C.M. 1005(e)(4) and the judge's own ruling in the companion case, violated his right to due process of law and a fundamentally fair sentencing hearing.

Petitioner also argued that the military judge abused his discretion by denying Petitioner's motion to sever two sets of similar, but unrelated, offenses. Petitioner contended that the members improperly considered the much stronger evidence on the first set of offenses to find Petitioner guilty of many of the second, much weaker, set of allegations. Petitioner concluded by arguing

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[4] The instruction is recounted verbatim in the Court of Appeals' decision. 53 M.J. at 498-499. *See* Appendix at *9a*-10*a*.

that the failure to sever confounded his defenses and that the military judge's spillover instructions and segregation of the Government's evidence into two discrete packages were inadequate to prevent manifest injustice.

On August 31, 2000 the Court of Appeals affirmed the decision of the Navy-Marine Corps Court's as to both issues. *United States v. Duncan*, 53 M.J. 494 (2000).

STATEMENT OF THE FACTS

The Court of Appeals' opinion begins by quoting a lengthy excerpt from the opinion of the Navy-Marine Corps Court of Criminal Appeals graphically describing the alleged offenses. 53 M.J. at 496-497. This recitation was *not* a summation of the evidence before the court-martial. Rather it was the Court of Criminal Appeals' own assessment of the factual and legal sufficiency of the evidence. 48 M.J. 804-806.[5]

The Court of Appeals failure to discuss, or even acknowledge, the state of the evidence at trial is indicative of the Court of Appeal's outcome-oriented approach to this case. In deciding whether Petitioner was denied his right to a fundamentally fair trial because of the denial of severance, it is essential to look at the relative strengths and weaknesses of the evidence relating to both sets of offenses.

Events of June 17, 1994

On the evening of June 17, 1994, Petitioner and Private First Class Glenis Gambles picked up Ms. Debra [DR] by the side of U.S. Interstate 5 (I-5) in Oceanside, California, believing her to be a prostitute. Record at 1673, 1676. Ms. [DR] wore black

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[5] It also misrepresents the findings in the case. The second paragraph of this recitation describes an attempted robbery with which Petitioner was charged but subsequently *acquitted*. Record at 1876. Neither the Court of Criminal Appeals, nor the Court of Appeals for the Armed Forces, mention the acquittal in their decisions.

thongs, a black minidress, and a black leather riding jacket. Record at 1328. From this point, Petitioner's description of the facts and Ms. [DR]'s diverge.

Petitioner testified that he and PFC Gambles asked Ms. [DR] to perform simultaneous sexual acts of sexual intercourse and fellatio with them. Record at 1680-1683. Ms. [DR] agreed and they drove to a secluded location where Ms. [DR] unzipped Petitioner's pants and performed fellatio on him while having intercourse with PFC Gambles. Record at 1682-1683. PFC Gambles became angry when Ms. [DR] secreted menstrual blood on his penis during intercourse and began to beat and kick her while she was lying on the ground. Record at 1683-84. Petitioner drove away with PFC Gambles, leaving Ms. [DR] on the ground. Record at 1685.

Ms. [DR] went to a hospital where she was given a sexual assault examination and treated for bruises and scratches. Record *at* 1558. The nurse in charge of the sexual assault intervention team testified that the physical examination of Ms. [DR]'s genitalia was "inconclusive, inconsistent" with rape by force. Record at 1562. The nurse also found no evidence of injury as a result of oral or anal copulation. Record at 1562-1563. Ms. [DR] refused to provide information to medical personnel or investigators, purportedly because she had an outstanding warrant for her arrest. Record at 1455-1456.

Ms. [DR], however, testified that upon entering Petitioner's car, she informed him and PFC Gambles that she was not a prostitute. Record at 1329. She testified that they drove for a while and, when Petitioner and PFC Gambles allegedly refused to let her out of the car, she panicked. Record at 1332. Ms. [DR] testified that Petitioner purportedly hit her in the face and that PFC Gambles pulled her from the car and beat her. Record at 1333. She further testified that PFC Gambles then forced her back into the rear seat of the car and raped her from behind while Petitioner allegedly forced her to perform fellatio and threatened to kill her if she would not. Record at 1335-1337. Finally, she testified that Petitioner and PFC Gambles purportedly tried to murder her by driving over her with

the car. Record at 1338. She testified that she saw the car headlights coming right at her and that she got up and ran from the scene. Record at 1338.

Ms. [DR] testified that she had used crystal methamphetamine prior to testifying. Record at 1346. She admitted that she was a drug addict. Record at 1400. She testified she had used methamphetamine the day of the offenses. Record at 1324. She testified that she uses the equivalent of $100 per day of methamphetamine but doesn't pay for it. Record at 1403.

Events of July 24, 1994

On the evening of July 24, 1994, Petitioner allegedly agreed to go out with PFC Gambles. Record at 1047-48. PFC Gambles retrieved a loaded pistol from his locker and brought it to Petitioner's room. Record at 1049. PFC Miller agreed to drive them in his pickup truck to Oceanside, California. Record at 1050. During this time, Petitioner was drinking alcohol. Record at 1053; *see also* Record at 965-68, 992-93. In Oceanside, Petitioner and PFC Gambles walked across the street to Buccaneer Beach, a waterfront recreation area. The Petitioner allegedly broke a glass liquor bottle on Mr. [JM]'s head and beat him. Record at 927, 929. PFC Gambles held out the pistol and ordered Mr. [JM]'s companion, Ms. [AM], to take her clothes off and walk to the water's edge. Record at 928. A moment later, PFC Gambles turned and fired a shot over his shoulder to scare away a Mr. [RS] who was coming to the aid of Mr. [JM] and Ms. [AM]. Mr. [JM] also fled the scene. Record at 989.

PFC Gambles then led Ms. [AM] across the street and into a shaded area where he raped her. Record at 931. Petitioner allegedly followed them and forced Ms. [AM] to perform fellatio on him. Record at 931. Petitioner and PFC Gambles allegedly then took [AM] to PFC Miller's pickup truck. Record at 932. While they drove around the area, Petitioner allegedly attempted to anally sodomize Ms. [AM] and then allegedly raped her and forced her to perform fellatio on both him and PFC Miller. Record at 939.

The truck pulled off into a forested area where Petitioner allegedly forced her to perform fellatio on him while PFC Gambles anally sodomized her. Record at 943. Ms. [AM] testified that the two switched places. Record at 944. Eventually, PFC Gambles returned to the truck. Allegedly, Petitioner remained and forced her to perform fellatio on him again, and then kicked her backward so that she fell halfway down a 15-foot, grassy ravine. Record at 944. The three Marines then returned to Camp Pendleton. Record at 1067.

All other facts necessary for disposition of the issues are set forth in the argument, *infra*.

REASONS FOR GRANTING THE PETITION

This petition presents four interrelated issues involving the adequacy of military procedures to prevent court-martial members from improperly considering extremely salient, but extremely prejudicial, information in reaching their findings and sentence. This Court should grant this petition because:

I. The manifestly prejudicial nature of joining these similar, but unrelated, sets of particularly brutal offenses presents an important question of federal law: When does such joinder amount to a denial of due process? This question has not been, but should be, settled by this court.

II. The constitutionality of the military's narrower rule for severing similar, but unrelated, offenses is an important question of federal law which has not been, but should be, settled by this Court.

III. The Court of Appeals' decision abrogates R.C.M. 1005(e)(4) and substitutes its own regime of "truth-in-sentencing." The Court of Appeals made no findings that the President acted irrationally by promulgating R.C.M. 1005(e)(4). Therefore its decision conflicts with *United States v. Scheffer*, 523 U.S. 303 (1998) and calls for an exercise of this Court's supervisory power.

IV. The reliability of the presumption that the court-martial members followed the military judge's instruction to ignore

prejudicial information, in light of the inherent bias of court-martial members arising out of their appointment by the convening authority and modern social science research, is an important question which should be settled by this Court.

ARGUMENT

The Court of Appeals decision must be reversed because:

I. Petitioner's conviction of all of the offenses, despite the weakness of the evidence relating to the Ms. [DR] offenses, the confounding of Petitioner's defenses and the Government's strategy to exploit the effects of prejudicial spillover, and the disparate results in the companion case, are clear evidence that Petitioner was denied a fundamentally fair trial under the Fifth Amendment.

II. There are no significantly special military interests, necessitating a substantially narrower threshold for severance of offenses in the military, that outweigh Petitioner's right to equal protection and justify a departure from the Federal Rules of Criminal Procedure.

III. The Court of Appeals for the Armed Forces is not at liberty to ignore the plain language of R.C.M. 1005(e)(5) or sanction a military judge's deliberate and intentional violation of that rule.

IV. Common sense, empirical research into jury dynamics, and the inherent bias of members appointed by the convening authority, compel the conclusion that court-martial members ignored the military judge's spillover instructions on findings, as well as his instruction to disregard the possibility of parole on sentencing.

I

Petitioner was denied a fundamentally fair trial as the result of the military judge's refusal to sever the offenses.

This Court has recognized that if the prejudice from joinder

of offenses is so great, it can deny a defendant his Fifth Amendment right to a fair trial. *United States v. Lane et al.*, 474 U.S. 438, 446 (1986). This case presents just such a degree of prejudice as evidenced by: (A) The accentuated the risk of spillover arising out of the strong-weak nature of the unrelated sets of allegations; (B) the confounding of Petitioner's defenses, and (C) the disparate results between Petitioner's court-martial and the companion case.

A.

The risk of spillover, and the likelihood of prejudice, were accentuated by the strong-weak character of the two sets of offenses in this case.[6] The evidence admitted on the Ms. [AM] set of charges was much stronger than that admitted on the Ms. [DR] charges.[7] The Court of Appeals' acknowledged that "the evidence of Ms. AM's rape and brutalization would not be admissible to show appellant's rape and brutalization of Ms. DR, one month earlier." *United States v. Duncan*, 53 M.J. at 498. Thus admissibility under MIL.R.EVID. 404(b), MCM (1995 ed.) and the MIL.R.EVID. 403, MCM (1995 ed.) balancing test are not at issue in this case.

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[6] *Compare with United States v. Southworth*, 50 M.J. 74, 77-78 (1999) ("The evidence itself does not suggest spillover. Instead of a strongly supported allegation joined with a weakly supported one, the Government presented strong and independent factual cases with respect to each victim.")

[7] The Ms. [AM] charges relating to July 24, 1994 were supported by direct evidence from the testimony of several credible witnesses, in addition to the alleged victim, and from physical evidence in the form of the victim's medical examination results. In contrast, the evidence for the Ms. [DR] charges relating to June 17, 1994 was much weaker. Medical evidence taken from Ms. [DR] showed no signs of forcible intercourse or oral or anal sodomy. Record at 1462-1463. The Government's evidence consisted mainly of Ms. [DR]'s own testimony, whose credibility was attacked with evidence of contemporaneous drug abuse, previous false official statements to police and state authorities, and her unwillingness to be examined or interviewed by the police, medical personnel, and defense attorneys. Record at 1324, 1419-1424, 1455-1456.

Under such circumstances, the substantial risk of prejudicial spillover of proof in cases of similar, but unrelated, offenses is heightened. *United States v. Haye*, 29 M.J. at 215 ("[W]here the criminal intent involved in two offenses is similar (although the offenses themselves are unrelated) and, significantly, where the proof of one would not be admissible to prove the other, there is a serious danger that overwhelming proof on one will "spill over" and prejudice a legitimate defense to another."); *see also United States v. Alexander*, 135 F.3d at 477 ("where joinder is based upon the "similar character" of the indictment's charges, the risk of potential prejudice to the defendant from a joint trial is enhanced"); *United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994) ("[W]hen offenses are joined because of their 'same or similar character,' the risk of unnecessary unfairness infiltrating the joint trial is elevated.") (citing 8 MOORE'S FEDERAL PRACTICE § 8.05[4] (citations omitted)); *United States v. Smith*, 112 F.2d 83, 85 (2d Cir. 1940) ("juries are apt to regard with a jaundiced eye a person charged with two crimes than a person charged with one.").

Moreover the Government deliberately chose to enhance the risk of spillover by presenting its case on the stronger Ms. [AM] charges first, even though that set of offenses was alleged to have occurred more than one month after the alleged assault on Ms. [DR]. Record at 922.

Noticeably absent from the Court of Appeals' opinion is any indication that the Court of Appeals found the evidence as to both sets of offenses to be "overwhelming," i.e. no possibility of prejudice. *See United States v. Lane et al.*, 474 U.S. at 450. Also absent from the Court of Appeals decision is any evaluation of whether spillover actually occurred. *See e.g. United States v. Southworth*, 50 M.J. at 77-78 (1999).

Instead the Court of Appeals relied exclusively upon its confidence that the members were able to follow the military judge's instructions to consider the two sets of offenses separately. *United States v. Duncan*, 53 M.J. at 498.

Perhaps in a case involving more esoteric, non-violent, offenses the members could compartmentalize the evidence, afford

the accused his presumption of innocence, and hold the Government to its burden of proving each offense beyond a reasonable doubt. It was, however, asking too much of the members in this case to compartmentalize the evidence *in the face of two separate women* alleging, as the Navy-Marine Corps Court observed, "crimes of violence the brutality of which we perceive as far exceeding the common experience of most court members." *United States v. Duncan*, 48 M.J. at 808 (emphasis added).[8]

In *United States v. Foutz*, the Fourth Circuit rejected the presumption that a jury will follow a limiting instruction under similar circumstances, holding that "the prejudice to the defendant, arising from the weakness of the government's one case and strength of the other, [were] so marked that we cannot presume that the jury adhered to limiting instructions and properly "segregate[d] [the] evidence into separate intellectual boxes." 540 F.2d at 738 (internal citations omitted).

B.

Prejudice also occurs when joinder of similar offenses embarrasses or confounds an accused in making his defense. *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964) (citations omitted). *See, also,* 25 MOORE'S FEDERAL PRACTICE §614.03[1][b] (3d ed. 1999) (prejudice may arise from the joinder of offenses occurs when an accused wishes to testify as to only one count of a multi-count indictment

The test for prejudice adopted by the federal courts under FED.R.CRIM.P. 14 requires a defendant to make a convincing showing that he has important testimony to give concerning one count, and a strong need to refrain from testifying on the other. *See United States v. Werner*, 620 F.2d 922, 930 (2nd Cir. 1980). "[A]

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[8] The Court of Appeals took pains to repeatedly characterize the allegations as "brutal" and "heinous." *United States v. Duncan*, 53 M.J. at 496, 498, and 500. It even rationalized its approval of the military judge's instruction to the members on Petitioner's eligibility for parole based upon "the sheer brutality of appellant's crimes." *Id.* at 500.

defendant may be willing to take the stand and testify as to one count but might prefer to remain silent and put the government to its proof on another count." *United States v. Lewis*, 547 F.2d 1030, 1033 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111, 51 L. Ed. 2d 566, 97 S. Ct. 1149 (1977); *see also United States v. Garey*, 813 F. Supp. 1069, 1074 (D. Vt. 1993) *aff'd without opinion* 19 F.3d 8 (2d Cir. 1994). A defendant who makes such a showing may be entitled to severance. *United States v. Archer*, 843 F.2d 1019, 1022 (8th Cir. 1988).

At trial Petitioner moved to sever, in part, because he intended to testify as to the Ms. [DR] charges but remain silent as to the Ms. [AM] charges and put the Government to its proof. Record at 98-101. Petitioner argued that, regardless of any instruction that the members must not infer guilt from an accused's silence, his taking the stand to rebut one set of charges and remaining silent as to the other set of charges would inevitably taint the members' ability to not infer guilt from his silence. *Id.* at 99. In fact, Petitioner testified at trial as to the [DR] charges, arguing that she consented to the sexual acts. Record at 1668-1717. Petitioner did not testify as to the [AM] charges, and relied on reasonable doubt and voluntary intoxication to rebut many of the charges, or specific intent elements, thereof, involving Ms. [AM]. Record at 1765-1772; *United States v. Duncan*, 53 M.J. at 498.

The fact that he testified on one set of charges necessarily highlighted his failure to testify on the other charges. The Court of Appeals' opinion that he was not prejudiced by this dilemma flies in the face of the military judge's own concession. Record at 101.[9]

The Court of Appeals' decision also neglects to mention the prosecution's use of cross-examination to prejudice Petitioner's decision to not take the stand with regard to the Ms. [AM] offenses. Petitioner did not testify concerning the Ms. [AM] offenses. The

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[9] "MJ: No. I mean, I think you have a good point here.... [I]f the accused testifies as to one set of offenses, however, and not the other, I mean, what you're really saying is that is going to sharpen the fact that he didn't testify as to one set of offenses and despite any instructions the members would simply infer that this is an admission of guilty by silence."

defense did, however, elicit testimony that Petitioner had been drinking alcoholic beverages prior to those offenses. Later, during cross-examination of Petitioner's testimony regarding the Ms. [DR] offenses, the prosecutor asked whether Petitioner had any alcohol on the evening of the alleged offenses against Ms. [DR]. Record at 1689. The prosecutor followed up Petitioner's negative reply by asking: "You didn't need it [alcohol] that night, correct?" Record at 1689.[10] The clear implication of the prosecutor's question, that if Petitioner were not intoxicated on June 17th the members should not believe he was intoxicated on July 24th, was planted.

This attempt by the prosecution to undermine the accused's right to remain silent as to the Ms. [AM] charges was not lost on the members, one of whom then asked Petitioner, "Do you have a drinking problem?" Record at 1704.[11] This was exactly the prejudice that the military judge had presciently anticipated and for which he, paradoxically, refused to grant relief. Record at 105 ("[the members] may find an inconsistency between the two and ask themselves like, well, why wasn't he...intoxicated both times or why wasn't there consent both times. And the defense would perhaps illicitly suffer some erosion of their position that way.").

Severance, rather than a curative instruction, was the appropriate remedy here where joinder of the two sets of charges confounded Petitioner's defenses and prejudiced his Fifth Amendment right to remain silent.

C.

Had petitioner been acquitted of some of the charges involving Ms. [DR] or Ms. [AM], the Court of Appeals' conclusion that the members followed the military judge's instructions might

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[10] The military judge sustained the defense's objection to the question as argumentative.

[11] In military practice, court-martial members may ask questions directly of the witnesses. The military judge, in this instance, sustained the defense's objection to the question as outside the scope of direct examination. Record at 1704.

have merit. *See e.g. United States v. Southworth*, 50 M.J. at 78 ("The court members obviously distinguished between the two rape allegations, finding appellant not guilty of raping AL but guilty only of indecent assault."); *United States v. Vest*, 116 F.3d1179, 1190 (7th Cir. 1997) ("The jury, moreover, seems to have taken the instruction to heart because it returned not guilty verdicts on two counts."). Instead, Petitioner was convicted of every offense arising out the alleged assaults on both Ms. [DR] and Ms. [AM].

The fact that his co-accused, PFC Gambles, was not convicted of all the offenses on substantially the same evidence offers clear evidence that the members in Petitioner's court-martial did not follow the military judge's instructions to separate the two sets of offenses.

For example, Petitioner was convicted of the attempted murder of Ms. [DR] by allegedly trying to drive over her with a car. In the companion case of *United States v. Gambles*, PFC Gambles was acquitted on the same evidence.[12] That evidence consisted only of Ms. Roebuck's own testimony that she thought she saw headlights coming at her. Record at 1447. She admitted that the car was never closer than 30 to 45 feet away. Record at 1447, 1464. Moreover, she was testifying to events observed after having been badly beaten by PFC Gambles and while under the influence of methamphetamine. Record at 1338

Nor did the prejudicial impact extend exclusively to the Ms. [DR] charges. Petitioner was convicted, and his conviction affirmed by the lower court, of the attempted murder of Ms. [AM]. The only evidence consisted of Petitioner allegedly kicking Ms. [AM] and causing her to fall halfway down the grassy slope of a 15-foot deep ditch. Record at 944. A separate panel of the Navy-Marine Corps Court set aside co-conspirator Gambles' conviction for the same attempted murder of Ms. [AM]. *United States v. Gambles*, 1997 CCA LEXIS 541 at 9-10, No. 96-0352 at 11 (N.M.Ct.Crim.App. October 3, 1997) (unpublished) *aff'd* 50 M.J. 49 (May 26, 1998) (summary disposition).

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[12] *See* Appendix at 33a.

This is noteworthy because Gambles was convicted for the actions of Petitioner as a co-conspirator. The panel of the Navy-Marine Corps Court which set aside Gambles' conviction did so because it found the evidence factually insufficient to prove Petitioner actually intended to kill Ms. [AM]. Conversely, the panel which considered Petitioner's record concluded on substantially identical evidence that Petitioner did intend to kill Ms. [AM]. *United States v. Duncan*, 48 M.J. at 804-806.

The alleged offenses in this case are heinous and brutal. The requirements of the Due Process Clause, however, "inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. *Malinski v. New York*, 324 U.S. 401, 416-417 (1945).

WHEREFORE this honorable Court should grant this petition to consider whether denial of severance amounted to a denial of due process where prejudicial spillover of evidence led to Petitioner's wrongful conviction of at least two specifications of attempted murder and confounded Petitioner's defenses.

II

Petitioner was denied equal protection of the law because of the military's narrower rule for severance of offenses.

Military accused, including Petitioner, are denied equal protection of the law under the Fifth Amendment and Article 36, UCMJ, because the military rule for severing similar, but unrelated, offenses is substantially narrower than its federal counterpart.

Both the military and federal rules favor joinder of similar, though unrelated, offenses. The military rule is, however, broader because it permits joinder of both major and minor offenses regardless of whether they are related. *Compare* R.C.M. 601(e)(2) *with* FED.R.CRIM.P. 8(b); *see also United States v. Southworth*, 50

M.J. 74, 76 (1999).

Conversely, the military rule governing severance of offenses "roughly parallels FED.R.CRIM.PROC. 14, *but is much narrower* because of the general policy in the military favoring trial of all known charges at a single court-martial." Drafters' Analysis of R.C.M. 906(b)(10), App. 21 at A21-53, MCM (1995 ed.) (emphasis added).[13]

Under FED.R.CRIM.P. 14, the "first hurdle" to obtaining severance is a showing of prejudice. *United States v. Lane et al.*, 474 U.S. at 449. If the district court nevertheless declines to grant severance, the judge's decision is reviewed for abuse of discretion to determine whether the decision had a substantial influence on the outcome of the proceedings. *Id.*(citing *Kotteakos v. United States*, 328 U.S. 750 (1946)); *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1998) *cert. denied* 525 U.S. 855 (1998).

Under R.C.M. 906(b)(10), however, the standard for granting a motion to sever is "to prevent manifest injustice." The Court of Appeals has never defined "manifest injustice" but, instead, has chosen to define what it is not. *See e.g. United States v. Curry*, 31 M.J. at 375 (no manifest injustice where evidence of one offense admissible against other); *United States v. Southworth*, 50 M.J. at 77-78 (no manifest injustice where evidence and findings do not suggest spillover). Now the Court of Appeals has concluded that, regardless of the nature of the charges or the state of the evidence and findings, there can be no manifest injustice so long as the members are properly instructed.

The practical import of this narrower standard is that severance is not available in the military, no matter how prejudicial and unfair the joinder. *See United States v. Haye*, 29 M.J. 213, 215 (C.M.A. 1989) ("Military practitioners rarely move for

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[13] This narrower standard, however, does not apply to motions to sever joint trials involving *multiple defendants*. For multiple defendants, the military rule tracks FED.R.CRIM.P. 14. *See* R.C.M. 906(b)(9), MCM (1995 ed.) ("Severance of multiple accused, if it appears that an accused or the government is prejudiced by a joint or common trial.")

of offenses...custom and tradition have shown that such motions are likely to be futile.").

The equal protection component of the Fifth Amendment mandates uniform treatment by the federal government of all persons "similarly situated". *Bolling v. Sharp*, 347 U.S. 497 (1954). Congress has specifically directed the President to "so far as he considers practicable, apply the principles of law ... generally recognized in the trial of criminal cases in the United States district courts." Art. 36(a), UCMJ.

Where disparate government actions disadvantage a suspect class, or impinge on fundamental rights, this Court reviews under a standard of strict scrutiny. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). The government must then demonstrate that the disparate treatment is narrowly tailored to serve a compelling state interest. *Id.*

The right to a fundamentally fair trial is a "fundamental" right. *See e.g. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991) ("Few interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors."); *Strickland v. Washington*, 466 U.S. 668, 684 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses...."). Consequently, the government must demonstrate that this disparate treatment is narrowly tailored to serve a compelling state interest.[14]

R.C.M. 906(b)(10) was drafted more narrowly than its federal counterpart "because of the general policy in the military favoring trial of all known charges at a single court-martial." Drafters' Analysis, *supra*. This general policy, embodied in R.C.M. 601(e)(2), is inconsistent with Fed.R.Crim.P. 8(a) because the federal rule is "too unwieldy to be effective, particularly in

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[14] Because the severance of joined offenses for prejudice is not an area of law peculiar to the military, this Court should not apply its traditionally deferential standard of review. *See Middendorf v. Henry*, 423 U.S. 25, 43 (1975) ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference.").

combat or deployment." Drafters' Analysis of R.C.M. 601(e)(2), App. 21 at A21-31, MCM (1995 ed.)

This case, however, was not tried on deployment or during combat. It was tried over the course of seven months, on 25 separate days, in southern California, and only after the companion case had been tried months before.[15] The military judge's essential findings of fact in support of his decision to deny severance do not list any military exigency that necessitated joinder. *Supra* at 4.

In cases which involve "offenses joined on the ground that they 'are of the same or similar character', but where evidence of one offense would not be admissible to prove another, the saving of time effected by a joint trial is minimal." *United States v. Foutz*, 540 F.2d 733, 738 (4th Cir. 1976); *see also United States v. Coleman*, 22 F.3d 126, 132 (7th Cir. 1994) (Separate counts that for the most part depend on separate evidence save fewer steps when tried together). In fact, the military judge's order to bifurcate the presentation of evidence necessitated calling witnesses to both sets of charges to testify on separate occasions. *United States v. Duncan*, 48 M.J. at 803. Thus the military judge's "remedy" of bifurcation, in lieu of severance, defeated the very argument for joinder, i.e. efficiency.

WHEREFORE, this honorable Court should issue a writ of certiorari to require the Government to demonstrate which compelling military interests justify the narrower standard for severance of offenses in the military.

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[15] Since the alleged offenses occurred off-base, involve civilian victims, are not uniquely military, one is left to wonder why the military elected to expend the time and resources to prosecute these offenses over which the State of California would clearly have had jurisdiction. It would be ironic if the expansive court-martial jurisdiction this Court has so deferentially accorded the military is being used to circumvent procedural protections afforded civilians, rather than to promote good order and discipline within the services.

III

The Court of Appeals' Erred By Denying Petitioner Relief From a Fundamentally Unfair Sentencing Hearing.

The military judge instructed the members, over defense objection, that Petitioner would be eligible for parole if sentenced to life imprisonment. As a result, Petitioner was denied a fundamentally fair sentencing hearing because the members were unlawfully encouraged to adjudge life imprisonment instead of a lesser term of years.

The Court of Appeals' decision has used this case to advance its own beliefs and agenda for sentencing in courts-martial and is clearly erroneous because: (A) R.C.M. 1005(e)(4) prohibits the members from considering the possibility of parole in arriving at a sentence; (B) the military judge was seeking to influence the members to return a harsher sentence against the Petitioner than otherwise; and (C) a military judge should not be able to intentionally prejudice the members deliberations and then cloak his error in the guise of "harmlessness" by instructing the members to "not be concerned about" about what he intentionally elected to bring to their attention.

A.

Instructions on sentencing at courts-martial are largely left to the discretion of the military judge. R.C.M. 1005(a), MCM (1995 ed.). R.C.M. 1005(e)(4), however, *requires* the military judge to instruct the members that "they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority."

The President has declared, through R.C.M. 1005(e)(4) that the members' questions about parole and good time are not related to the members' duty to adjudge an appropriate sentence. Until the Court of Appeals' decision in this case, military courts-martial have always been prohibited from speculating about future mitigating

action when adjudging a sentence.[16] In addition, military judges were precluded from instructing members on collateral consequences of the court-martial over defense objection.[17]

Now, for the first time, the Court of Appeals has concluded that the members' inquiry into the availability of parole in this case was "reasonably related to consideration of the heinous nature of appellant's offenses." *United States v. Duncan*, 53 M.J. at 500. The Court of Appeals' decision is clearly contrary to the President's direction in R.C.M. 1005(e)(5), which the Court's opinion fails to distinguish or even mention.

Judge Sullivan's opinion uses this case as a vehicle to implement the Court of Appeal's own specific agenda to ensure the members arrive at the harshest possible sentences. *See United States v. Boone*, 42 M.J. 308, 314 (1995) (Sullivan, J., dissenting) ("The parole authorities probably will reduce the ultimate sentence even more. Nobody tells the members this. The judge--learned in the law and its operation--knows that an accused rarely serves the full time of sentence, but the jury is uneducated on this point. Perhaps it is time to have "truth in sentencing."). *See also* n.18, *infra*.

This Court recently affirmed the authority of the President to promulgate rules of procedure for courts-martial and has clearly indicated that the Court of Appeals for the Armed Forces is not free to ignore them. *Cf. United States v. Scheffer*, 523 U.S. 303 (1998).

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[16] MANUAL FOR COURTS-MARTIAL, U.S. ARMY (1949 ed.), ¶*80a* at 80 ("Courts will be instructed, however, to exercise their own discretion and will not adjudge sentences known to be excessive in reliance upon the mitigating action of the reviewing or higher authority."); William Winthrop, MILITARY LAW AND PRECEDENTS at 402 (2d ed. rev. 1920) ("[T]he court may not trench directly upon the *remitting or mitigating power* of the commander.").

[17] *See United States v. Greaves*, 46 M.J. 133, 137 (1997)(defense objected to military judge not giving instruction on punitive discharge's effect on retirement eligibility); *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988)("It is certainly not error for the judge to answer the members' questions *if an accused agrees.*" (emphasis in original)); *United States v. McLaren*, 34 M.J. 926, 934, n. 9 (A.F.C.M.R. 1992) (The judge may answer members' questions regarding collateral consequences, but only with the accused permission).

This Court has an obligation to ensure that all of the President's rules are obeyed, even those that inure to the benefit of an accused.

B.

The Court of Appeals' subversion of the military sentencing scheme is further evidenced by the absence of any mention of the military judge's contrary ruling in the companion case. The military judge in this case also presided over the companion case of PFC Gambles tried several weeks earlier. *United States v. Gambles*, 1997 CCA LEXIS 541 at 1, No. 96-0352 at 1.

In *Gambles* the members also raised the question, in the midst of sentence deliberations, as to whether parole was available and when a prisoner would become eligible for parole. *Gambles* Record at 1960. The prosecutor requested the military judge give them a full and complete answer. *Gambles* Record at 1960. The defense counsel objected, requesting the military judge decline to even answer the question and tell the members that they may not speculate as to why. *Gambles* Record at 1960. The defense predicated its objection on the belief that the members "may believe that since there is a possibility of parole that they should jack up any sentence so to speak of confinement in order to cover any eventuality...." *Gambles* Record at 1961.

The judge stated that he agreed with the defense and instructed the members that they must "adjudge what they consider a legal, just, and appropriate sentence; and, you know, not to speculate about what if anything may be done to that sentence in the future." *Gambles* Record at 1961. Twenty minutes later, the members returned with a sentence that included confinement for 40 years. *Gambles* Record at 1963-1964.

Companion cases. Same judge. Diametrically opposed sentencing instructions. Vastly disparate sentences. No member of the public, looking at these facts, could conclude that the judge's actions in this case were anything other than a calculated effort to increase Petitioner's sentence. No member of the public, looking at

these facts, can have confidence in the integrity of the military justice system or of the military appellate courts which could affirm such an outcome.

C.

The Court of Appeals' concluded any error was harmless because the members were presumed to follow the military judge's instruction to "not be concerned about" parole. *United States v. Duncan*, 53 M.J. at 500. This was to no more than a "wink, wink, nudge, nudge" invitation to factor in the possibility of parole and good time in formulating their sentence. Such an invitation from the military judge who, unlike the parties must give every appearance of neutrality and impartiality, is intolerable.

The questions about parole and rehabilitation were the only questions asked by the members. They originated with the senior member, Colonel Coulman, a fact probably not lost on the junior members. *United States v. Duncan*, 53 M.J. at 499. The Court of Appeals, itself, characterized these questions as "crucial military concern[s]". *Id.* at 500. To nevertheless presume the members were capable of, much less willing to, ignore the answers defies logic.

The Court of Appeals' decision, if allowed to stand, gives military judges the license to intentionally instruct the members on matters they are clearly not permitted to consider under R.C.M. 1005(e)(4).[18] He or she will then be able to render such errors "harmless" by the simple instruction to "ignore what I just told you."

WHEREFORE this honorable Court should grant this petition for certiorari to decide whether the Court of Appeals' decision is contrary to R.C.M. 1005(e)(4) and the requirements of due process.

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[18] "The availability of parole and rehabilitation programs are issues of general knowledge and concern, and as such, they may be instructed upon, especially when requested by the members. *See generally* RCM 1005(a)...." *United States v. Duncan*, 53 M.J. at 500. Note the absence of any reference to R.C.M. 1005(b)(4).

IV.

The presumption that court-martial members will follow a judge's instructions to ignore prejudicial information is not a reliable basis for concluding their exposure to that information was harmless.

The Court of Appeals' rejected Petitioner's challenge to the prejudicial joinder of offenses, and to the judge's instruction on parole eligibility, based solely upon the presumption that the court-martial members followed the military judge's instructions.[19]

If the presumption is unreliable, and the members did consider the prejudicial evidence in arriving at their findings and sentence, then Petitioner was denied his fundamental right to a fair trial and sentencing hearing guaranteed by the Fifth Amendment.[20]

The Court of Appeals erred in relying upon this presumption to conclude that denial of severance and instruction on parole were harmless because: (A) The presumption lacks a reliable basis in knowledge and experience when applied to the facts of this case; and (B) the manner in which courts-martial members are selected undermines the presumption's reliability in military practice.

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[19] *United States v. Duncan*, 53 M.J. at 498 ("Regardless of which offenses were proven first, we are confident that the military members were able to follow their instructions to consider them separately."); *id.* at 500 ("In any event, any error by the judge in instructing on these matters was clearly harmless.... The military judge also instructed the members that, although parole existed in the military justice system, they could not consider it in arriving at an appropriate sentence for appellant.") (internal citations omitted).

[20] *See e.g. United States v. Lane et al.*, 474 U.S. at 446 (1986); *Romano v. Oklahoma*, 512, U.S. 1, 12-3 (discussing whether the erroneous admission of evidence so infected the sentencing proceeding with unfairness as to render the jury's sentence a denial of due process.).

A.

As this Court has observed, "[t]he rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

This Court recently held, in the context of expert testimony, that such testimony based upon specialized experience must have "a reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (quoting *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. at 592). By the same token, if the presumption that members follow a judge's instructions lacks a reliable basis in knowledge and experience under particular circumstances, then trial courts and appellate courts should not rely upon it in assessing prejudice or harmlessness.

Courts have recognized the presumption's unreliability under certain circumstances, for example expert assessments of victim credibility in child sexual abuse cases. *See e.g. United States v. Knox*, 46 M.J.688, 691 (N.M.Ct.Crim.App. 1997) ("Notwithstanding the cautionary instruction given in the appellant's case, we will not indulge in "[t]he naive assumption that all prejudicial effects can be overcome by instructions to the jury, [that] all practicing lawyers know to be unmitigated fiction . . . .") (quoting *Krulewitch v. United States*, 336 U.S. 440 (1949) (Jackson, J., concurring)).

Modern social science research into jury dynamics, has produced results which are clearly to the contrary to the presumption that jurors follow instructions to disregard salient, yet prejudicial, information that is before them. *See, generally* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES (Jonathan M. Golding & Colin M. MacLeod eds., Lawrence Erlbaum Associations, Publishers 1998); Tanford, S. & Penrod, S., *Social Inference Processes in Juror Judgments of Multiple*

Offense Trials, 47(4) JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 749-765 (1984).[21]

This body of research demonstrates that jury members not only ignore instructions to disregard salient, yet highly prejudicial, evidence, but that they accord such evidence an even greater degree of value than they might otherwise. The more salient the information, the less able jurors or court-martial members are to ignore it. *See* Kassin, S. & Studebaker, C., *Instructions to Disregard and the Jury: Curative and Paradoxical Effects, in* INTENTIONAL FORGETTING: INTERDISCIPLINARY APPROACHES, ch. 15 at 420-22 (Jonathan M. Golding & Colin M. MacLeod eds., Lawrence Erlbaum Associations, Publishers 1998) (Studies showing that instructions to disregard inadmissible evidence either have no effect on jurors, i.e. they continue to consider the information, or result in a greater reliance on the evidence than if no instruction had been given ('boomerang effect').

The information the members were instructed to disregard did not involve procedural matters or evidence tangential to their purpose. Rather, the military judge asked the members to do the impossible--ignore salient information that went to their core functions, i.e. weighing the credibility of witnesses and deciding upon an appropriate punishment. Record at 102.[22] In the same way, the member's consideration of whether life imprisonment was an appropriate punishment was irrevocably colored by the military judge's disclosure that Petitioner would be eligible for parole.

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[21] These articles and studies, though unmentioned by the Court of Appeals in its opinion, were provided to it and discussed during oral argument. *See* Letter Citation to Supplement Authorities of 3 December 1999.

[22] DC: Right. But given, sir, that these would not be admissible under 404(b) if, in fact, the trials are joined, then you have the fact with the [AM] offense there, you have they're going to lend less credibility to PFC Duncan's testimony on the [DR] offense.

MJ: Well, that's possible. But I suppose that would be kind of a matter of human nature, if you will.

B.

Reliance upon courts-martial members to follow a judge's instruction to ignore highly prejudicial evidence is further complicated by the manner in which courts-martial members are selected. The same convening authority that referred these charges to trial also handpicked the members. Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). Four of the members, including the senior member, were on the convening authority's personal staff or had just completed a tour there. Appellate Exhibit LX.

In *United States v. Hilow*, 32 M.J. 439 (C.M.A. 1991), the convening authority's staff selected members based on whether they were perceived to support "a command policy of hard discipline." *Id.* at 441. Other examples of court-stacking abound. *See* Glazier, Major Guy P., *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three–Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1, 51-53 (1998). Abuse of the member selection process to affect cases' outcomes "is difficult to see and harder to prove." *United States v. Haagenson*, 52 M.J. 34, 37 (1999) (Sullivan, J., concurring).

Even if the convening authority did not overtly attempt to influence the outcome of the trial or sentencing hearing through his selection of members, the specter of unlawful command influence looms over these proceedings. The members knew they had been detailed to the case by the same superior officer who has directed that the accused be tried on all the charges before them. It would be obvious to the members that following the judge's instructions might result in an outcome contrary to that which the convening authority would *expect* based upon *all* the evidence. The risk that the members followed their intuition, rather than the instructions of a judge outside the convening authority's chain-of-command, was therefore elevated.

A "jury" selection system that is so vulnerable to conscious and subconscious manipulation is insufficiently fair and reliable to entitle the Government to a presumption that court-martial members

will follow the judge's instructions.

WHEREFORE, this honorable Court should issue a writ of certiorari to review the correctness of the Court of Appeal's harmlessness determinations in light of its reliance on the presumption.

CONCLUSION

If this Court declines to act now, the Court of Appeals' can effectively preclude future review by this Court by declining to grant petitions for review in subsequent cases. *United States v. Boudreaux*, 35 M.J. 291 (C.M.A. 1992) ("[A]n accused can only seek review by the Supreme Court if the Court of Military Appeals has decided his case. Art. 67a, Uniform Code of Military Justice, 10 USC § 867a.").

Military members are entitled to a system of justice that is fundamentally fair. Petitioner's court-martial was not fair. The Court of Appeals' decision enshrines this unfairness into two critical components of military procedure, severance of offenses and sentencing instructions, for all courts-martial that follow. This honorable Court should grant this petition for certiorari to review the Court of Appeals' decision.

Respectfully submitted,

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APPENDIX

United States v. Duncan, 53 M.J. 494* (2000)

UNITED STATES,

v.

Timothy S. DUNCAN, Private First Class
U.S. Marine Corps, Appellant

No. 99-0109

Crim. App. No. 96-00701

United States Court of Appeals for the Armed Forces

Argued December 8, 1999

Decided on August 31, 2000

[*495] *SULLIVAN, J., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE, and EFFRON, JJ., and COX, S.J., joined.*

Counsel

For Appellant: Lieutenant Commander Michael J. Wentworth, JAGC, USN (argued).

For Appellee: Lieutenant Timothy E. Curley, JAGC, USNR (argued); Colonel Kevin M. Sandkuhler, USMC, and Commander Eugene E. Irwin, JAGC, USN (on brief); Lieutenant Commander JoAnn W. Melesky, JAGC, USN.

Military Judge: Theodore G. Hess

This opinion is subject to editorial correction before publication.

Judge SULLIVAN delivered the opinion of the Court.

Appellant was tried on various dates between November 4, 1994, and May 8, 1995, by a general court-martial composed of officer members at Camp Pendleton, California. Contrary to his pleas, he was found guilty of 3 specifications of attempted murder; attempted robbery; attempted forcible sodomy; 3 specifications each of conspiracy and of rape; larceny; 6 specifications of forcible sodomy; 2 specifications of kidnapping; carrying a concealed weapon; and communicating a threat, in violation of Articles 80, 81, 120, 121, 125, and 134, Uniform Code of Military Justice, 10 USC §§ 880, 881, 920, 921, 925, and 934, respectively. He was sentenced to a dishonorable discharge, confinement for life, total forfeitures, a fine of $200, and reduction to E-1. On March 29, 1996, the convening authority approved the sentence as adjudged. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence as approved on review below. United States v. Duncan, 48 MJ 797 (N.M. Ct. Crim. App. 1998). On September 8, 1998, the Navy-Marine Corps Court of Criminal Appeals denied appellant's motion for reconsideration.

On August 17, 1999, this Court granted review on the following issues:

I

WHETHER THE LOWER COURT ERRED IN AFFIRMING THE MILITARY JUDGE'S RULING NOT TO SEVER THE CHARGES CONCERNING MS. [DR] AND MS. [AM].

[*496] II

WHETHER THE LOWER COURT ERRED IN AFFIRMING THE SENTENCE WHERE THE MILITARY JUDGE ABUSED HIS DISCRETION BY INSTRUCTING THE MEMBERS ON THE AVAILABILITY OF PAROLE AND REHABILITATION PROGRAMS OVER DEFENSE OBJECTION.

We hold that the military judge did not abuse his discretion in refusing to sever the charges in this case (see United States v. Southworth, 50 MJ 74 (1999)) or in giving his sentencing instructions on the possibility of parole and the existence of rehabilitation programs (see generally United States v. Greaves, 46 MJ 133 (1997)).

Private First Class (PFC) Duncan was charged with a series of brutal crimes against Ms. DR, including rape, forcible sodomy, and attempted murder, which were alleged to have occurred on June 17, 1994. He was also charged with a series of brutal crimes against Ms. AM, which again included rape, forcible sodomy, and attempted murder, on July 24, 1994. Finally, he was charged with several additional offenses against Ms. AM's male companion and RS, a bystander.

The Court of Criminal Appeals stated:

> The evidence establishes that on 17 June 1994, the appellant and PFC Glenis Gambles rented a small, white, two-door Mazda 323. With Gambles driving, they picked up [Ms. DR] who was hitchhiking in Oceanside. She immediately announced to them that she was not a prostitute. She had become concerned upon realizing that the driver of the car was a Black man, since she had experienced some troubles before with Black men. After they refused to stop and let her out where she asked, she became panicked and begged them to let her out. She was being told that they were going to kill her. She tried to

kick out the window of the back seat where she was riding. Eventually, the appellant and Gambles stopped in a remote area. Both the appellant and Gambles struck [Ms. DR] several times with their fists and kicked her. She was forced to remove her clothes, except for her underpants. The appellant forced her to orally copulate him while simultaneously Gambles raped her from the rear and attempted to anally sodomize her, after ripping off her underpants. After Gambles got menstrual fluid on his clothing, he became enraged, pulled her from the car and beat her. Gambles then forced her back into the car, drove to another area, parked and beat her some more. She went limp and "played dead." They got into the car and started as if they were driving away, then turned and drove toward where she was lying on the ground. She jumped up and ran away. All of her possessions that she was carrying were taken away in the car. The appellant later gave her pager to his aunt and asked her to change the number. The appellant also bragged to some of his fellow Marines about having robbed and raped a girl whom he and Gambles had picked up.

The evening of 24 July 1994, the appellant, PFC Miller, and PFC Gambles agreed to go out and rob someone of their money. They set out on this expedition with Miller driving his pickup truck. After driving around, they spotted two females at a phone booth and approached them to rob them, but the females got into a car and left before the robbery could be completed. Apparently frustrated, the trio drove to Buccaneer Beach in Oceanside. There [Ms. AM] and her friend, Jordan McLean, were sitting on the beach. Richard Schnittger and his eight months-pregnant wife were sitting in a car nearby, but not close enough for Schnittger to recognize [Ms. AM] whose family he'd known for 8 years. The appellant and Gambles walked past [Ms. AM] and McLean with the appellant carrying a 40-ounce bottle of St. Ides beer. They turned and approached the couple and the appellant struck McLean on the head with the bottle with sufficient force to break it. While the appellant

beat up McLean, Gambles forced [Ms. AM] along the beach and forced her to strip off her clothing, threatening her with the .380 Colt handgun which he had thoughtfully brought along. Schnittger [*497] saw the appellant beating McLean and got out of his car to try to intervene. Gambles, who was dragging a naked [Ms. AM] along the beach, saw him approaching and fired the gun in his direction, motivating Schnittger to return to his car and depart the area. After patting down McLean's pockets, the appellant joined Gambles and struck [Ms. AM] with his fist. He then forced [Ms. AM] to orally copulate him while Gambles raped her from the rear. They then forced [Ms. AM] into Miller's truck and drove her to another area, beating, raping and sodomizing her repeatedly along the way. They told her that they were going to kill her. They parked in a dark place, forced [Ms. AM] out of the truck, and repeatedly raped and sodomized her. After they completed their sexual degradation of [Ms. AM], the appellant lined her up and kicked her off a cliff.

About 5 days later the appellant learned that Miller was an unauthorized absentee. The appellant told Corporal Swenson that Miller had been messed up by them having hit a guy over the head with a bottle and raped a girl the previous week. He said that if Miller went to the police he would kill him.

48 MJ at 804-05.

SEVERANCE

The first issue we will address is whether the military judge erred in refusing to sever the trial of the offenses concerning Ms. AM from those concerning Ms. DR. Appellant notes that severance is required under RCM 906(b)(10), Manual for Courts-Martial, United States (1994 ed.), to prevent ""manifest injustice" and, citing

the decision of this Court in United States v. Southworth, supra at 76, he asserts that a manifest injustice occurred in his case. He argues that evidence of the offenses against Ms. AM was not admissible to show his guilt of the offenses against Ms. DR; the military judge's limiting instructions and other bifurcation measures were ineffective; and impermissible crossover was a real possibility in his case. He also argues that refusal to sever these offenses violated his right against self-incrimination. We disagree.

Our starting point in resolving this case is recognition of the fact that joinder of offenses at a court-martial is more permissive than joinder in federal district courts. United States v. Southworth, supra at 76; see RCM 601(e)(2) (" two or more offenses . . . . may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related"). Cf. Fed.R.Crim.P. 8 ("Two or more offenses may be charged in the same indictment . . . . if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."). See generally United States v. Keith, 1 USCMA 442, 448, 4 CMR 34 (1952). However, in view of "the same or similar character" of the charged offenses in this case, there was no joinder problem under either rule. See United States v. Coleman, 22 F.3d 126, 131-134 (7th Cir. 1994); United States v. Alexander, 135 F.3d 470, 475-76 (7th Cir.), cert. denied, 525 U.S. 855 (1998).

We also note that a military judge, like a federal district judge, has power to sever the trial of offenses in certain circumstances. See RCM 906(b)(10); cf. Fed.R.Crim.P. 14. This Court has recognized the difference in wording between the military judge's power ("only to prevent manifest injustice") and the federal district judge's power ("[i]f it appears that a defendant or the government is prejudiced by a joinder"). See United States v. Southworth, supra at 76; cf. United States v. Curry, 31 MJ 359 374 (1990). In any event, federal courts, both military and civilian, have been concerned with

preventing impermissible spillover in various ways from the proof of one offense into the trial of another offense. See United States v. Southworth, supra at 76; see United States v. Foutz, 540 F.2d 733, 736 (4th Cir. 1976). In general, "an abuse of discretion will be found only where the defendant is able to show that the denial of a severance [*498] caused him actual prejudice in that it prevented him from receiving a fair trial; it is not enough that separate trials may have provided him with a better opportunity for an acquittal. Vest, 116 F.3d at 1190; United States v. Moya-Gomez, 860 F.2d 706, 754 (7th Cir. 1988), cert. denied, 492 U.S. 908, 109 S.Ct. 3221, 106 L.Ed.2d 571 (1989)." United States v. Alexander, 135 F.3d at 477.

In light of the three-pronged test of Southworth, we conclude that the military judge did not abuse his discretion in holding that appellant could receive a fair trial on all the charges in this case. (R. 111) Admittedly, the judge recognized that the evidence of Ms. AM's rape and brutalization would not be admissible to show appellant's rape and brutalization of Ms. DR, one month earlier. However, this evidentiary judgment alone did not require that he grant the severance motion. See United States v. Southworth, supra at 77-78. In response to this problem, the military judge gave limiting instructions three times to the members to consider these offenses separately. (R. 700-701) (R. 1322) (R. 1835). 50 MJ at 77; United States v. Dixon, 184 F.3d 643, 646 (7th Cir. 1999). He also took steps to bifurcate the presentation of evidence and argument by the prosecution to avoid the risk of impermissible spillover. (R.901-902, 1799-1806). 50 MJ at 77; United States v. Dixon, supra at 646. In our view, regardless of which offenses were proven first, we are confident that the military members were able to follow their instructions to consider them separately. Id. at 646 ("The ability of a jury to follow instructions is instrumental to our theory of trial."); see also United States v. Coleman, 22 F.3d at 134-35 (elevated concern for unfairness when "same or similar character" offenses are joined, but severance not mandated); United States v. Hogan, 20 MJ 71, 73 (CMA 1985) ("chances of their

cumulating the evidence . . . substantially diminished" by proper instructions from judge).

We also conclude that the military judge did not abuse his discretion in holding that appellant's defenses would not be "confounded" or destroyed by a joint trial. Appellant's defense to the alleged rape of Ms. DR was that she consented to the act of sexual intercourse with appellant. Appellant's defense to the alleged rape of Ms. AM was voluntary intoxication and evidentiary insufficiency. These defenses, raised on different occasions with respect to different alleged victims, were neither logically nor practically inconsistent. Moreover, the mere fact that appellant asserted his right of self-incrimination with respect to his alleged crime against Ms. AM, but not with respect to the alleged crimes against Ms. DR, did not require a severance. See United States v. Dixon, supra at 646. Based on all the circumstances of this case, we conclude that the military judge did not abuse his discretion in denying the defense motion for severance. United States v. Foster, 40 MJ 140, 148 (CMA 1994); see also United States v. Kerr, 51 MJ 401, 406-07 (1999) (entire record should be considered in evaluating judge's ruling on spillover questions).

SENTENCE INSTRUCTIONS

The other issue in this case is whether the military judge erred in instructing the members over defense objection concerning availability of parole and rehabilitation programs in the military justice system. These instructions came in response to questions by the members addressed to the military judge. The specific questions were: "Will rehabilitation/therapy be required if PFC Duncan is incarcerated?" and "In military justice, is parole granted or are sentences reduced for good behavior? If so, do these reductions apply to a life sentence?" (R. 2035-37) Defense counsel objected to answering both questions because they concerned collateral consequences, and he requested that the members be simply told that these questions were "off-limits." (R. 2040)

The military judge agreed in part with defense counsel but rejected his suggested instruction. (R. 2039) Instead, he gave the following
instructions:

> Just to refresh your recollection, there have been two questions that have been asked. I'm going to answer the second question first and then the first question. [*499] I'll advise you what the questions were before I answer them. The first question is: In military justice, is parole granted or are sentences reduced for good behavior? If so, do these reductions apply to a life sentence?
>
> Now, members of the court, in answering this second question first, it is important to remind you of the nature of a court-martial in the military justice system. It is a completely independent agency temporarily created to determine the issue of guilt or innocence in a case and impose an appropriate sentence in the event of a conviction.
>
> After trial a variety of reviewing and higher authorities review the case. As an independent agency, you must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or other authority. You must do what you think is right today.
>
> Now, parole is available to an accused sentenced by a military court to serve confinement, including life imprisonment. The exercise of parole, however, depends upon several factors, including but not limited to the length of sentence to confinement, the nature of the convicted crimes, and the conduct of the accused during the period of confinement.
>
> You should determine, in terms of confinement, what you feel is appropriate for this accused. Under these circumstances, do not,

and I say again, do not be concerned about the impact of parole. When selecting an appropriate sentence, you should select a sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.

Now, I'm turning to your second question, which is: Will rehabilitation/therapy be required if PFC Duncan is incarcerated? Members of the court, you are advised that there are appropriate alcohol and sex offense rehabilitation programs available to the accused should he be confined as a result of the sentence in this case. The accused is not required to participate in any program of rehabilitation and treatment, but there are strong and usually effective incentives for him to do so while confined.

Now, Colonel Colemen, do these responses answer your questions?

Pres: Yes, sir.

(R. 2044) (Emphasis added.)

On appeal, appellant again argues that the military judge erred in giving the instructions noted above because parole and rehabilitation programs are "collateral consequences" of a court-martial sentence. He asserts that the general rule at courts-martial is that it should concern itself "with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration." Appellant's Final Brief at 9. He contends, therefore, that the military judge should "[o]rdinarily . . . reply that 'collateral consequences are not germane'"; and he cites United States v. Griffin, 25 MJ 423, 424 (CMA), cert. denied, 487 U.S. 1206 (1988), and United States v. Quesinberry, 12 USCMA 609, 612, 31 CMR 195, 198 (1962), for this rule, at least where the accused opposes the instruction. See United States v. Griffin, supra at 424.

We think this case is covered by our more recent decision in United States v. Greaves, 46 MJ 133 (1997). There, we rejected a bright-line rule prohibiting instructions on collateral consequences of a court-martial and instead adopted a more flexible approach focusing on the military judge's responsibility to give "appropriate sentence instructions." While the military judge's discretion in choosing whether to instruct upon such "collateral" matters is broad, he or she is required to give legally correct instructions that are tailored to the facts and circumstances of the case. United States v. Greaves, 46 MJ at 139 (citing United States v. Cook, 11 USCMA 579, 581, 29 CMR 395, 397 (1960), and United States v. Slaton, 6 MJ 254, 255 (CMA 1979)). Most importantly, military judges must give members answers which are clear. United States v. Griffin, 25 MJ at 424. When the members ask whether an accused will be required to participate in a rehabilitation program, as they did in this [*500] case, it is appropriate for the judge to answer if he or she can draw upon a body of information that is reasonably available and which rationally relates to the sentencing considerations in RCM 1005(e)(5). The availability of parole and rehabilitation programs are issues of general knowledge and concern, and as such they may be instructed upon, especially when requested by the members. See generally RCM 1005(a) ("The military judge shall give the members appropriate instructions on sentence") and RCM 801(a)(5) (duty of military judge to "[i]nstruct members on questions of law and procedure which may arise").

In the case at bar, the members themselves interrupted their deliberations to inquire about the possibility of parole and the existence of rehabilitation programs. See RCM 1005(b); see generally Article 46, UCMJ, 10 USC § 846, and RCM 913(c)(1)(F) (power of members to seek instructions from military judge and further evidence). Moreover, these inquiries were reasonably related to consideration of the heinous nature of appellant's offenses (see generally RCM 1001(b)(4) (evidence in aggravation)) and the possibility that he might be released in the future unreformed into

civilized society. See generally RCM 1001(b)(5) (evidence of rehabilitative potential). In view of the sheer brutality of appellant's crimes, it is quite clear that these were "crucial military concern[s]" which were properly addressed by the military judge. See United States v. Greaves, 46 MJ at 139. In any event, any error by the judge in instructing on these matters was clearly harmless. Article 59(a), UCMJ, 10 USC § 859(a). The military judge also instructed the members that, although parole existed in the military justice system, they could not consider it in arriving at an appropriate sentence for appellant. Moreover, his instruction on rehabilitation programs also benefited appellant because it strongly suggested that such programs did exist and that appellant would likely participate in them as a matter of prison exigency. Accordingly, we conclude that these instructions, even if erroneous, did not materially prejudice appellant's substantial rights.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

United States v. Duncan, 48 M.J. 797* (1998)

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.**

BEFORE

E.D. CLARK LARRY D. WYNNE R.B. LEO

UNITED STATES

v.

**Timothy S. DUNCAN, 484 94 7277
Private First Class (E-2), U.S. Marine Corps**

PUBLISH

NMCM 96 00701 Decided 31 July 1998

Sentence adjudged 4 May 1995. Military Judge: T.G. Hess. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

[*800] LT SYED N. AHMAD, JAGC, USNR, Appellate Defense Counsel
LCDR NANCY B. JONES, JAGC, USN, Appellate Government Counsel

CLARK, Senior Judge:

At the appellant's general court-martial, a panel of members

convicted him, contrary to his pleas, of several offenses[23] which

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[23] **Charge I**: Violation of the Uniform Code of Military Justice [hereinafter UCMJ], Article 80

Specification 2: 24 July 1994, attempted armed robbery and strong-arm robbery of Jordan M. McLean, with a firearm and by striking him in the head with a 40-ounce beer bottle, in the body with fists, and kicking him in the head and body with feet, searching his clothing, and firing a weapon.

Charge II: Violation of the UCMJ, Article 81

Specification 1: 24 July 1994, conspire with Gambles and Miller to rob Jordan M. McLean and to kidnap [M];

Specification 2: 24 July 1994, conspire with Gambles to commit rape and forcible oral and anal sodomy of [M];

Charge III: Violation of the UCMJ, Article 120

Specification 1: 24 July 1994, in an area adjacent to Pacific Street, rape [M];

Specification 2: 24 July 1994, in a pickup truck, rape [M];

Charge IV: Violation of the UCMJ, Article 125

Specification 1: 24 July 1994, in an area adjacent to Pacific Street, commit forcible sodomy of [M] by placing Duncan's penis in [M]'s mouth;

Specification 2: 24 July 1994, in a pickup truck, commit forcible sodomy of [M] by placing Duncan's penis in [M]'s anus;

Specification 3: 24 July 1994, in a pickup truck, commit forcible sodomy of [M] by placing Miller's penis in [M]'s mouth;

Specification 4: 24 July 1994, in an area adjacent to State Street, commit forcible sodomy of [M] by placing Gambles' penis in [M]'s mouth;

Specification 5: 24 July 1994, in an area adjacent to State Street, commit forcible sodomy of [M] by placing Duncan's penis in [M]'s mouth, then in [M]'s anus, then in [M]'s mouth;

Charge V: Violation of the UCMJ, Article 134

Specification 1: 24 July 1994, kidnap [M];

Specification 3: 24 July 1994, unlawfully carry a Colt .380 semiautomatic handgun concealed on or about his person;

Additional Charge I: Violation of the UCMJ, Article 80

Specification 1: 24 July 1994, while attempting to perpetrate a robbery and a rape, attempt to murder Richard A. Schnittger by pointing and shooting at him with a Colt .380 semiautomatic handgun;

Specification 2: 24 July 1994, while perpetrating a rape, attempt to murder [M] by kicking her backwards over a cliff;

consti- [*801] tuted two veritable crime sprees separated in time by about 5 weeks. The members adjudged a sentence which included confinement for life, forfeiture of all pay and allowances, reduction to pay grade E-1, a fine of $200.00, and a dishonorable discharge. The convening authority approved the adjudged sentence.

The appellant has submitted 17 assignments of error,[24] of which

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Specification 3: 17 June 1994, while perpetrating a rape, attempt to murder [R] by repeatedly striking her in the head and body with feet and fists, and by attempting to run over her body with an automobile as she lay on the ground;

Specification 4: 17 June 1994, attempt to commit forcible anal sodomy of [R] by placing Gambles' penis against the opening and trying to push it inside [R]'s anus;

Additional Charge II: Violation of the UCMJ, Article 81

Specification: 17 June 1994, conspire with Gambles to rob, kidnap, and rape [R];

Additional Charge III: Violation of the UCMJ, Article 120

Specification: 17 June 1994, rape [R];

Additional Charge IV: Violation of the UCMJ, Article 121

Specification: 17 June 1994, steal one purse containing miscellaneous items, $40.00 in U. S. currency, a clear plastic pager, a gold chain and locket, and miscellaneous items of women's clothing, value in excess of $100.00;

Additional Charge V: Violation of the UCMJ, Article 125

Specification: 17 June 1994, commit forcible sodomy of [R] by placing Duncan's penis in [R]'s mouth;

Additional Charge VI: Violation of the UCMJ, Article 134

Specification 1: 17 June 1994, kidnap [R];

Specification 2: 29 July 1994, communicate to LCpl Swenson a threat to kill Miller.

[24] I. THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE MEMBERS ABOUT COLLATERAL CONSEQUENCES OF THE SENTENCE.

II. THE MILITARY JUDGE ERRED WHEN HE DENIED THE MOTION TO SEVER THE CHARGES CONCERNING [R] AND [M].

III. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S CHALLENGE FOR CAUSE.

IV. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST TO DEPOSE MS. [M].

V. THE CONVENING AUTHORITY WAS DISQUALIFIED FROM ACTING ON THIS COURT-MARTIAL.

VI. APPELLANT'S SENTENCE TO CONFINEMENT FOR LIFE IS INAPPROPRIATELY SEVERE.

VII. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ATTEMPTED TO MURDER MR. SCHNITTGER.

VIII. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ATTEMPTED TO MURDER MS. [M].

IX. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ATTEMPTED TO MURDER MS. [R].

X. APPELLANT WAS PUNISHED BEFORE TRIAL BY BEING ASSIGNED TO MAXIMUM CUSTODY CONFINEMENT.

XI. THE MILITARY JUDGE ERRED WHEN HE ADMITTED, AS AGGRAVATION, EVIDENCE THAT MS. [M] HAD TO TESTIFY AT THE COURTS-MARTIAL, THAT SHE WAS TESTIFYING TO PROTECT OTHER WOMEN FROM APPELLANT, AND THAT SHE BELIEVED THAT SHE NEEDED THERAPY FOR THE REST OF HER LIFE. (Citations omitted.)

XII. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST TO ADMIT EVIDENCE OF PROSTITUTION BY MS. [R] TO CORROBORATE APPELLANT'S TESTIMONY THAT SHE APPEARED TO BE A PROSTITUTE AND AGREED TO COMMIT SEXUAL ACTS AFTER BEING PICKED UP AS A HITCHHIKER, AND TO REBUT HER TESTIMONY THAT SHE WAS NOT A PROSTITUTE. (Citations omitted.)

XIII. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION TO CONSOLIDATE CHARGE III, SPECIFICATIONS 1 AND 2 (RAPE OF [M]), CHARGE IV, SPECIFICATIONS 1 [illegible] (SODOMY OF [M]), ADDITIONAL CHARGE I, SPECIFICATION 4 AND ADDITIONAL CHARGE V AND THE SPECIFICATION THEREUNDER (SODOMY OF [R]), BECAUSE THE OFFENSES WERE COMMITTED IN A CONTINUOUS-COURSE-OF-CONDUCT ON THE SAME DAY WITH NO APPRECIABLE

we will discuss several in detail. The supplemental assignment of error[25] is without merit and warrants no discussion. *See* Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7C of 3 Oct. 1990, [*802] § 0120a(1); Post-Trial Affidavit of Colonel Durrett.

SEPARATION OF TIME. (Citations omitted.)

XIV. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS MADE TO CORPORAL (THEN-LANCE CORPORAL) SWENSON BECAUSE CORPORAL SWENSON SUSPECTED APPELLANT OF AN OFFENSE, AND WAS IN HIS IMMEDIATE CHAIN-OF-COMMAND. (Citations omitted.)

XV. THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S REQUEST FOR A NEW TRIAL AFTER LEARNING THAT ONE OF THE MEMBERS, DURING THE TRIAL, HAD SPOKEN WITH THE GOVERNMENT'S SOLE REBUTTAL WITNESS OUTSIDE THE COURTROOM. (Citations omitted.)

XVI. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT IS GUILTY OF RAPING [R], WHERE A MEDICAL EXAMINATION CONDUCTED IMMEDIATELY AFTER THE INCIDENT REVEALED THAT THERE WAS NO PHYSICAL EVIDENCE OF A RAPE, AND WHERE THE VICTIM WITNESS WAS INHERENTLY INCREDIBLE IN HER IDENTIFICATION OF APPELLANT DUE TO HER ADMITTED DRUG ADDICTION AND THE FACT THAT SHE WAS UNDER THE INFLUENCE OF DRUGS ON THE NIGHT OF THE ALLEGED INCIDENT. (Citations omitted.)

XVII. THE TRIAL COUNSEL COMMITTED PLAIN ERROR WHEN HE ARGUED THAT APPELLANT WAS "EVIL INCARNATE; THAT HE GIVES WHOLE NEW MEANING TO THE TERMS 'VICIOUS' AND 'MONSTER.'" (Citation omitted.)

[25] APPELLANT WAS TRIED AND CONVICTED BY AN IMPROPERLY CONVENED COURT-MARTIAL ON CHARGES THAT WERE IMPROPERLY REFERRED TO IT, RENDERING SAID PROCEEDINGS VOID.

Assignment of Error I

During deliberations on the sentence the members presented an inquiry to the military judge. Appellate Exhibit CXXXIV contains the following two questions from the members:

> (1) Will rehabilitation/therapy be *required* if PFC Duncan is incarcerated?
> (2) In military justice, is parole granted or are sentences reduced for good behavior? If so do these reductions apply to a "life" sentence?

The military judge and counsel discussed the questions at a RULE FOR COURTS-MARTIAL 802, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)[hereinafter R.C.M.] conference, which is summarized in the Record at 2038-41. The military judge instructed the members, in pertinent part, as follows:

> Now, members of the court, in answering this second question first, it is important to remind you of the nature of a court-martial in the military justice system. It is a completely independent agency temporarily created to determine the issue of guilt or innocence in a case and impose an appropriate sentence in the event of a conviction.
>
> After trial a variety of reviewing and higher authorities review the case. As an independent agency, you must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening or other authority. You must do what you think is right today.
>
> Now, parole is available to an accused sentenced by a military court to serve confinement, including life imprisonment. The exercise of parole,

> however, depends upon several factors, including but not limited to the length of sentence to confinement, the nature of the convicted crimes, and the conduct of the accused during the period of confinement.
>
> You should determine, in terms of confinement, what you feel is appropriate for this accused. Under these circumstances, do not, and I say again, do not be concerned about the impact of parole. When selecting an appropriate sentence, you should select a sentence which will best serve the ends of good order and discipline, the needs of the accused, and the welfare of society.
>
> Now, I'm turning to your second [sic] question, which is: Will rehabilitation/therapy be required if PFC Duncan is incarcerated? Members of the court, you are advised that there are appropriate alcohol and sex offense rehabilitation programs available to the accused should he be confined as a result of the sentence in this case. The accused is not required to participate in any program of rehabilitation and treatment, but there are strong and usually effective incentives for him to do so while confined.

Record at 2043-44. The members deliberated another 40 minutes before returning with the sentence.

The defense had proposed the following instruction:

> A question has been posed regarding the availability of parole and good behavior credit in the military correctional system. You are instructed that the military justice system has

> within it different integral parts that make up the whole. As a sentencing authority at a court-martial, you now perform just one of the functions that make up the military justice system as a whole. In determining an appropriate sentence in this case, you should determine what you feel is appropriate for this accused. As your role in the military justice system as a whole is a limited one, you should not concern yourselves about the impact of a possible parole or good behavior credit sometime in the future. For purposes of determining an appropriate sentence at this court-martial, you must assume that no parole or good behavior exists. Your part in the military justice system is an integral one, but it is essential that you perform only that function which is within your purview. As I have previously instructed you, you should select a sentence which will best serve the ends of [*803] good order and discipline, the needs of the accused, and the welfare of society.

Appellate Exhibit CXXXV.

The propriety of a collateral consequences instruction depends upon the particular facts and circumstances of a case. *United States v. Greaves*, 46 M.J. 133, 139 (1997). The military judge has the discretion to determine whether such an instruction is appropriate. *Id.*

The gist of the appellant's argument seems to be that the military judge provided the members more information than they needed. We need not resolve that issue. The pertinent issue is whether the military judge provided the members proper guidance for determining an appropriate sentence. We find that he did. In addition to instructing the members as to the criteria for an appropriate sentence, the military judge emphasized to them that

they should not be concerned about the impact of parole. This was not an abuse of his discretion.

Absent evidence to the contrary, we may presume that the members followed the military judge's instructions. *United States v. Loving*, 41 M.J. 213, 235 (1994), *aff'd*, 517 U.S. 748 (1996); *United States v. Holt*, 33 M.J. 400, 408 (C.M.A. 1991); *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). The appellant has not shown that he was prejudiced by the military judge's instruction. We find no prejudice.[26] This assignment has no merit.

Assignment of Error II

The military judge denied the defense motion to sever the charges relating to the 17 June 1994 incidents from those relating to the 24 July 1994 incidents. Afterwards, the military judge and the trial counsel took considerable measures to prevent spillover of evidence from one set of charges to the other.

The Government's brief does a good job of describing the steps taken by both the military judge and the prosecution to bifurcate the evidence relating to the two dates of the offenses:

> The military judge took great care to ensure that spillover between offenses did not occur. First, during *voir dire*, the military judge specifically instructed the members that each offense was required to stand on its own and that evidence of each offense must be kept separate. (R. 700-01). He repeated the spillover instruction

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[26] We do not find that the disparity between the appellant's sentence, which included confinement for life, and that of PFC Gambles, which included confinement for 40 years, constitutes evidence that the members ignored the military judge's instructions.

> before the members began to deliberate on findings. (R. 1835). Moreover, he emphasized that the burden of proof is always on the Government to prove each and every element of each offense beyond a reasonable doubt. *Id.*

Answer on Behalf of the Government at 11.

During the opening statement as well as the closing arguments, the trial counsel emphasized the separateness of the 17 June incidents from the 24 July incidents. After completing presentation of evidence relating to the 24 July incidents, the trial counsel announced, in the presence of the members, that presentation of evidence on the 24 July incidents had been concluded. Record at 1317. Before other evidence was presented, the military judge instructed the members of the separate and discrete nature of the sets of offenses. He emphasized that they "must keep the evidence of each offense and each set of offenses separate." Record at 1322.

The members all indicated that they understood the instruction. Record at 1322-23. The prosecution then presented evidence relating to the 17 June incidents. Government witnesses who testified on both sets of offenses, *i.e.*, the nurse who examined both rape victims and a co-conspirator in the 24 July incidents, each testified on separate occasions to further ensure that their testimony would be considered in the proper context.

Upon a motion for appropriate relief, a military judge may grant a severance of offenses, but only to prevent manifest injustice. R.C.M. 906(b)(10); *United States v. Curtis*, 44 M.J. 106, 128 (1996). In the appellant's case, the record does not indicate [*804] that severance was necessary to prevent manifest injustice. It was within the discretion of the military judge to employ less radical measures to ensure the fairness of the proceedings. We find that the military judge did not abuse his discretion.

Assignment of Error III

One of the members, Lieutenant Colonel Hammes, stated during *voir dire* that he had seen an article in a newspaper concerning three Marines involved in a rape and an assault in town. Following extensive questioning of the members, during which the member indicated he had no predisposition as to the guilt or innocence of the accused, the military judge denied the defense's challenge for cause of the member.

The fact that a member is acquainted with a case is not disqualifying. *United States v. Anderson*, 36 M.J. 963, 969 (A.F.C.M.R. 1993), *aff'd*, 39 M.J. 431, *cert. denied*, 513 U.S. 819 (1994). A qualified juror need not be totally ignorant of the facts and issues involved. *United States v. Jobson*, 31 M.J. 117, 121 (C.M.A. 1990)(quoting *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975)).

We find that the military judge did not abuse his discretion in denying the challenge for cause against Lieutenant Colonel Hammes. This assignment of error has no merit.

Assignment of Error IV

Before the appellant obtained civilian counsel, his military defense counsel interviewed [M]. Afterwards, she would not agree to a pretrial interview by the appellant's civilian counsel. The military judge denied the defense motion for an order directing [M] to permit a pretrial interview and refused to prevent her from testifying. The appellant's claim that this constituted error is without merit. A witness has no obligation to submit to a pretrial interview. *United States v. Alston*, 33 M.J. 370, 373 (C.M.A. 1991); *United States v. Morris*, 24 M.J. 93, 95 (C.M.A. 1987).

Assignment of Error V

One of the appellant's accomplices in the crimes committed on 24 July 1994 was a Private Miller. At his own general court-martial, Private Miller pleaded guilty to certain offenses pursuant to a pretrial agreement. Private Miller testified at the appellant's general court-martial. The same convening authority convened both the appellant's court-martial and that of Private Miller. The appellant claims that the convening authority was disqualified from taking post-trial action on his case. This assignment of error is without merit. *United States v. Newman*, 14 M.J. 474, 482 (C.M.A. 1983).

Assignment of Error VI

We are not convinced that the appellant's sentence is inappropriately severe. The appellant's argument that there is too great a disparity between his sentence and that of Gambles is also not persuasive.

The appellant and Gambles were accomplices in both of the crime sprees. Both pleaded not guilty at general courts-martial. Although the findings were similar, the facts establish different levels of participation by the two in the attempted murders of [M] and [R]. During the attempted murder of [R], the appellant was driving the car with which they attempted to run over her. The appellant was the one who actually kicked [M] over a cliff in the attempt to murder her. Although the trial court convicted Gambles of that offense, this court found insufficient evidence to affirm that finding. We are satisfied that there are good and cogent reasons for the disparity between the appellant's sentence and that of Gambles.

This assignment of error is without merit.

Assignments of Error VII-IX, XVI

The appellant claims that there is insufficient evidence of his guilt to the attempted murders of Richard Schnittger, [M], and [R] and to the rape of [R]. We find no merit to these claims.

The evidence establishes that on 17 June 1994, the appellant and PFC Glenis Gambles rented a small, white, two-door Mazda 323. With Gambles driving, they picked up [R] [*805] who was hitchhiking in Oceanside. She immediately announced to them that she was not a prostitute. She had become concerned upon realizing that the driver of the car was a Black man, since she had experienced some troubles before with Black men. After they refused to stop and let her out where she asked, she became panicked and begged them to let her out. She was being told that they were going to kill her. She tried to kick out the window of the back seat where she was riding. Eventually, the appellant and Gambles stopped in a remote area. Both the appellant and Gambles struck [R] several times with their fists and kicked her. She was forced to remove her clothes, except for her underpants. The appellant forced her to orally copulate him while simultaneously Gambles raped her from the rear and attempted to anally sodomize her, after ripping off her underpants. After Gambles got menstrual fluid on his clothing, he became enraged, pulled her from the car and beat her. Gambles then forced her back into the car, drove to another area, parked and beat her some more. She went limp and "played dead." They got into the car and started as if they were driving away, then turned and drove toward where she was lying on the ground. She jumped up and ran away. All of her possessions that she was carrying were taken away in the car. The appellant later gave her pager to his aunt and asked her to change the number. The appellant also bragged to some of his fellow Marines about having robbed and raped a girl whom he and Gambles had picked up.

The evening of 24 July 1994, the appellant, PFC Miller, and PFC Gambles agreed to go out and rob someone of their money. They set out on this expedition with Miller driving his pickup truck. After driving around, they spotted two females at a phone booth and approached them to rob them, but the females got into a car and left before the robbery could be completed. Apparently frustrated, the trio drove to Buccaneer Beach in Oceanside. There [M] and her friend, Jordan McLean, were sitting on the beach. Richard Schnittger and his eight months-pregnant wife were sitting in a car nearby, but not close enough for Schnittger to recognize [M] whose family he'd known for 8 years. The appellant and Gambles walked past [M] and McLean with the appellant carrying a 40-ounce bottle of St. Ides beer. They turned and approached the couple and the appellant struck McLean on the head with the bottle with sufficient force to break it. While the appellant beat up McLean, Gambles forced [M] along the beach and forced her to strip off her clothing, threatening her with the .380 Colt handgun which he had thoughtfully brought along. Schnittger saw the appellant beating McLean and got out of his car to try to intervene. Gambles, who was dragging a naked [M] along the beach, saw him approaching and fired the gun in his direction, motivating Schnittger to return to his car and depart the area. After patting down McLean's pockets, the appellant joined Gambles and struck [M] with his fist. He then forced [M] to orally copulate him while Gambles raped her from the rear. They then forced [M] into Miller's truck and drove her to another area, beating, raping and sodomizing her repeatedly along the way. They told her that they were going to kill her. They parked in a dark place, forced [M] out of the truck, and repeatedly raped and sodomized her. After they completed their sexual degradation of [M], the appellant lined her up and kicked her off a cliff.

About 5 days later the appellant learned that Miller was an unauthorized absentee. The appellant told Corporal Swenson that Miller had been messed up by them having hit a guy over the head with a bottle and raped a girl the previous week. He said that if

Miller went to the police he would kill him.

Article 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c)(1994)[hereinafter UCMJ], requires this court to determine not only the legal sufficiency of the evidence, but also its factual sufficiency. The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987). Applying this test we must "draw every reasonable infer- [*806] ence from the evidence of record in favor of the prosecution." *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)(quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). In doing so, appellate courts acknowledge "the responsibility of the trier of fact to resolve conflicts in the testimony, to weight [sic] the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *United States v. Hart*, 25 M.J. 143, 146 (C.M.A. 1987)(quoting *Jackson*, 443 U.S. at 319).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, . . . [we are] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325.

We are convinced beyond a reasonable doubt of the appellant's guilt, legally and factually, of all of the offenses of which he was convicted.

Assignment of Error X

The appellant has not established that any of the conditions of his confinement were meant as punishment. We are satisfied that the limitations placed on the appellant's freedom were directly related

to the orderly operation of the brig, served a legitimate governmental function, and were no more rigorous than were required to ensure the appellant's presence at trial. This assignment of error has no merit.

Assignment of Error XI

A Family and Marriage Therapist who had met with [M] for about 20 hours testified in aggravation that the testimony was becoming progressively more traumatizing for [M]. She testified that [M]'s expressed motivation for continuing to testify was to protect herself and to protect other women from the appellant. Her prognosis was that [M] would require therapy for the remainder of her life. The military judge did not abuse his discretion in admitting this testimony. R.C.M. 1001(b)(4). This assignment of error is without merit.

Assignment of Error XII

The appellant testified that as soon as [R] entered the rental car she indicated that she was not a prostitute. Record at 1675. Later he testified that he could only assume that she was either a prostitute or a street girl, the difference being that a prostitute gets paid for sex. Record at 1711. He testified that he did not offer money to [R] and she did not request any. Record at 1712.

Whether [R] had a history of prostitution is not relevant to any issue of fact that the court-martial had to determine. The appellant testified as to his perception that the sex with [R] was consensual. He did not testify that he based this belief on her history of prostitution, but rather on his assumption that she was a prostitute or street girl. Therefore, even if she had a history of prostitution, evidence of it would not have been relevant. MIL. R. EVID. 401, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). The military judge did not abuse his discretion by refusing to admit such evidence. MIL. R. EVID. 402.

Assignment of Error XIII

The military judge did not abuse his discretion when he denied the defense motion to consolidate charges of rape and sodomy for offenses which occurred at different times and places. *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).

Assignment of Error XIV

The appellant summarily claims that the military judge erred by denying the defense motion to suppress statements the appellant made to his roommate, Lance Corporal [LCpl] Swenson, asserting that LCpl Swenson suspected the appellant of an offense and was in his chain of command. This assignment of error is without merit.

Although the military judge neglected to include his essential findings relating to this motion, we are able to determine the relevant facts employing our Article 66(c), UCMJ, 10 U.S.C. § 866(c), fact-finding powers. *United States v. Spriddle*, 20 M.J. 804, 806 (N.M.C.M.R. 1985).

[*807] The statements the appellant made in LCpl Swenson's presence on 29 July 1994 were spontaneous. There is no indication of prompting or interrogation by LCpl Swenson. There is no indication that LCpl Swenson suspected the appellant of any crime, with the possible exception of public drunkenness. Lance Corporal Swenson was not required to advise the appellant to not brag about his evening exploits. Article 31(b), UCMJ, 10 U.S.C. § 831(b).

On 29 July 1994, LCpl Swenson suspected PFC Miller, their other roommate, of being UA. His colloquy with the appellant was to try to determine the reason for Miller's absence. He had no reason to believe that Miller's absence was related to any crime committed by the appellant. He had no reason to believe that the appellant was guilty of anything more serious than being a braggart

and a loud-mouth. His conversation with the appellant was not an interrogation about crimes he suspected the appellant of committing. The incriminating statements volunteered by the appellant were non-responsive to the queries of LCpl Swenson. They were, in effect, spontaneous exclamations. Article 31(b), UCMJ, 10 U.S.C. § 831(b) warnings were not required. *United States v. Brown*, 40 M.J. 152 (C.M.A. 1994); *United States v. Davis*, 36 M.J. 337, 340 (C.M.A. 1993), *aff'd*, 512 U.S. 452 (1994).

Assignment of Error XV

During the testimony of the rebuttal witness, Cpl Kruse, one of the members, First Lieutenant Shelton, recognized that the two of them had served in the same unit. During a recess, the member and the witness encountered each other in the vicinity of the courtroom. During a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a) session, the member testified that he was not influenced by this contact with Cpl Kruse and that he followed the military judge's instructions. They briefly talked about people they knew from the unit. Neither mentioned the appellant's case.

The presumption of prejudice arising from communications between a member and a witness is a rebuttable one. *United States v. Elmore*, 33 M.J. 387, 394 (C.M.A. 1991)(quoting *United States v. Adamiak*, 4 C.M.A. 412, 417, 15 C.M.R. 412, 417 (1954)). The presumption is rebutted by a clear and positive showing that the communication did not and could not operate in any way to influence the decision of the members. *Elmore*, 33 M.J. at 394 (quoting *Adamiak*, 4 C.M.A. at 418, 15 C.M.R. at 418).

We are satisfied that the presumption of prejudice was rebutted in the appellant's case. The military judge did not err in denying the defense motion for a new trial.

Assignment of Error XVII

The appellant's civilian defense counsel, in his first opening statement before the government's case-in-chief, characterized the trial counsel's opening statement as portraying the appellant as a "vicious, evil, awful human being." Record at 915. In his second opening statement, after the government had rested its case but before presentation of any defense evidence, the civilian defense counsel told the members that the evidence would show that the accused was a "pretty good guy." Record at 1603. The defense then presented testimony from three witnesses and the appellant, the gist of which was that the appellant was a "pretty good guy." *See* Testimony of Mrs. Atkins, Record at 1606-11; Testimony of Mrs. McLaurin, Record at 1611-17; Testimony of Miss Gaceta, Record at 1618-26; Testimony of the appellant, Record at 1668-1717.

In rebuttal, the Government presented evidence that characterized the appellant as worthless as a Marine, as someone who referred to women in profanely derogatory terms, and as an untruthful person. Record at 1719-27.

In the Government's argument on the sentence, the trial counsel referred to both of the civilian counsel's arguments and the efforts to show "Duncan the man, Duncan the Marine," to refute the evidence of the appellant's viciousness. Trial counsel stated, "I submit to this court that he is evil incarnate; that he gives whole new meaning to the terms 'vicious' and 'monster.'" Record at 2019. The appellant claims that this part of [*808] the trial counsel's argument was plain error. We disagree.

The trial counsel's arguments must be based on a fair reading of the record of trial. *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994). "[A] trial counsel is well within his rights to strike hard blows by forcefully commenting on the evidence presented at trial." *United States v. Waldrup*, 30 M.J. 1126, 1132 (N.M.C.M.R. 1989).

We need not reiterate our summary of the sufficiency of the evidence of the appellant's guilt. Our earlier summary does not adequately reflect the brutality, the callousness, the viciousness of what the appellant did to his victims. We do not portray as graphically as did the witnesses and the evidence the harm that the appellant did to his victims. The record, however, does establish that the appellant committed crimes of violence the brutality of which we perceive as far exceeding the common experience of most court members.

The trial counsel's characterization of the appellant as "evil incarnate" is a fair comment upon what the evidence had established and what the members had found to be fact, as was reflected in the verdicts. Such a statement merely portrayed the appellant as a personification of an entity which causes injury or harm. *See* THE RANDOM HOUSE COLLEGE DICTIONARY 458, 672 (rev. ed. 1980). Saying that the appellant's conduct was monstrous merely recognized what the members had found; it "deviat[ed] grotesquely from what is natural or normal." *Id.* at 865. Calling the appellant "vicious" was appropriate, if redundant. *Id.* at 1466.

The challenged statement was a single sentence appearing near the end of an argument which was transcribed over seven single-spaced pages. Having considered that single sentence in context, we are satisfied that the appellant has assigned to it far more significance than the members ever did. We are satisfied that the members did not sentence the appellant for what the trial counsel said. They sentenced the appellant for what he did.

Conclusion

Accordingly, we affirm the findings and the sentence as approved on review below.

E.D. CLARK

Judge WYNNE and Judge LEO concur.

CONCURRED PRIOR TO DEPARTURE
LARRY D. WYNNE

R.B. LEO

United States v. Gambles, No. 9600352 (N.M.Ct.Crim.App. October 3, 1997)

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.**

BEFORE

WILLIAM J. LUCAS W.F. GRANT JOHN T. OLIVER

UNITED STATES

v.

**Glenis L. GAMBLES, Jr., 567 25 2135
Private First Class (E-2), U.S. Marine Corps**

NMCM 96 00352 Decided 3 October 1997

Sentence adjudged 23 January 1995. Military Judge: T.G. Hess. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, 1st Marine Division (Rein), FMF, Camp Pendleton, CA.

LT JAMES T. MAHONEY, JAGC, USNR, Appellate Defense Counsel
LT BENNETT J. LEE, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

LUCAS, Senior Judge:

We have examined the record of trial, the assignments of error,[27] and the Government's response thereto. Except as

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[27] I. THE GOVERNMENT FAILED TO PROVE, BEYOND A REASONABLE DOUBT, THAT APPELLANT ATTEMPTED TO MURDER RICHARD A. SCHNITTGER.

II. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT ATTEMPTED TO MURDER AMY MAGGARD.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION BY DENYING THE DEFENSE MOTION TO SEVER THE CASE INTO TWO SEPARATE TRIALS FOR THE ROEBUCK AND MAGGARD INCIDENTS, WHERE THERE WAS A SIGNIFICANT RISK THAT THE EVIDENCE OF GUILT FROM THE MAGGARD CASE WOULD IMPROPERLY SPILL OVER TO THE ROEBUCK CASE, CAUSING MANIFEST INJUSTICE TO APPELLANT.

IV. THE MILITARY JUDGE ERRED IN DENYING THE DEFENSE MOTION FOR A NEUROLOGICAL EXAMINATION OF APPELLANT WHERE SIGNIFICANT EVIDENCE WAS OFFERED BY THE DEFENSE OF THE EXISTENCE OF A GENETIC MENTAL DEFECT AND THE COURT-APPOINTED 706 BOARD WAS INSUFFICIENT TO PROTECT APPELLANT'S SUBSTANTIAL RIGHTS.

V. THE FINDING OF THE COURT THAT APPELLANT IS GUILTY OF CONSPIRING TO ROB ROEBUCK (ADDITIONAL CHARGE II), IS INCONSISTENT WITH THE COURT'S FINDING THAT APPELLANT DID NOT STEAL FROM ROEBUCK (ADDITIONAL CHARGE IV), AND FURTHER FAILS ON THE GROUNDS OF FACTUAL INSUFFICIENCY.

VI. APPELLANT'S SENTENCE TO 40 YEARS OF CONFINEMENT IS UNDULY SEVERE UNDER THE CIRCUMSTANCES OF THIS CASE.

VII. AFTER APPELLANT RAISED THE ISSUE OF UNREASONABLE MULTIPLICATION OF CHARGES, THE MILITARY JUDGE ERRED IN FAILING TO CONSOLIDATE THE TWO CONSPIRACY SPECIFICATIONS UNDER CHARGE II INTO ONE CONSPIRACY INVOLVING KIDNAPPING, ROBBERIES, RAPE, AND SODOMIES. THE EVIDENCE DOES NOT SUPPORT THE FORMATION OF TWO SEPARATE CONSPIRACIES, AND THE EVIDENCE DOES NOT DISTINGUISH THE MAGGARD CONSPIRACY [ies] FROM THE ROEBUCK CONSPIRACY, ADD'L CHARGE II,

explained below for Specification 2 under Additional Charge I, we have concluded that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed.

In a fully contested case before a general court-martial, officer and enlisted members, the appellant was convicted, as a

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WHICH WAS PROPERLY CHARGED AS ONLY ONE SPECIFICATION INCLUDING KIDNAPPING, ROBBERY AND RAPE. (Citations omitted.)

VIII. THE EXTENT TO WHICH THE GOVERNMENT WAS ALLOWED TO USE LEADING QUESTIONS TO OBTAIN DEBRA ROEBUCK'S TESTIMONY WAS PLAIN ERROR. (Footnote omitted.)

IX. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT IS GUILTY OF RAPING DEBRA ROEBUCK, WHERE A MEDICAL EXAMINATION CONDUCTED IMMEDIATELY AFTER THE INCIDENT REVEALED THAT THERE WAS NO PHYSICAL EVIDENCE OF A RAPE, AND WHERE THE VICTIM WITNESS WAS INHERENTLY INCREDIBLE IN HER IDENTIFICATION OF APPELLANT DUE TO HER ADMITTED DRUG ADDITION, THE FACT THAT SHE WAS UNDER THE INFLUENCE OF DRUGS ON THE NIGHT OF THE ALLEGED INCIDENT, FAILED TO POSITIVELY IDENTIFY THE APPELLANT IN A PHOTO ARRAY, AND BLATANTLY ADMITTED TO DISTRUSTING ALL BLACK MEN AS CRIMINALS. (Citations and footnote omitted.)

X. THE MILITARY JUDGE ERRED IN FAILING SUA SPONTE TO REQUIRE A CHANGE OF VENUE DUE TO EXTENSIVE MEDIA COVERAGE OF THIS CASE IN LOCAL MEDIA, AND ERRED IN FAILING SUA SPONTE TO RELIEVE MAJOR DeGUZMAN FROM THE MEMBERS PANEL WHERE HE ADMITTED DURING VOIR DIRE THAT HE HAD BEEN EXPOSED TO MEDIA COVERAGE AND FELT IT WAS NEGATIVE PUBLICITY FOR THE MARINE CORPS. (Citation and footnote omitted.)

XI. THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT IS GUILTY AS A CO-CONSPIRATOR OR AS AN AIDER AND ABETTOR TO THE RAPE AND SODOMY OF AMY MAGGARD BY PFC DUNCAN WHICH OCCURRED IN PFC MILLER'S PICKUP TRUCK. (Footnote omitted.)

perpetrator, aider-and-abetter, or co-conspirator, of committing many extremely serious crimes. They included: the kidnapping, multiple rape, and multiple forcible sodomy of two young women (Ms. M and Ms. R); the attempted murder of one of those women (Ms. M); the attempted robbery of Ms. M's male companion; the attempted murder of a witness to the assaults on Ms. M and her companion; and several related conspiracy offenses.

The adjudged sentence, approved by the convening authority, consists of a dishonorable discharge, total forfeitures, reduction to pay grade E-1, and confinement for 40 years. Confinement for life was authorized at trial.

Assignments of Error I, II, V, IX, and XI all contend, for different reasons and for different offenses, that the Government failed to adequately establish the guilt of the appellant. Except for Specification 2 under Additional Charge I, we disagree.

This Court may affirm only such findings of guilty as it finds correct in law and fact. Art. 66(c), Uniform Code of Military Justice, 10 U.S.C. § 866(c)(1994)[hereinafter UCMJ]. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, a rational factfinder could have found all the essential elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). When applying this test, we are bound to draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993)(quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)). The test for factual sufficiency is whether we are convinced of the appellant's guilt beyond a reasonable doubt after weighing the evidence in the record and making allowances for not having personally observed the witnesses. *Turner*, 25 M.J. at 325.

All of the guilty findings, including Specification 2 under Additional Charge I, are legally sufficient.

Regarding the issue of factual sufficiency, except for Specification 2 under Additional Charge I, which alleges the attempted murder of Ms. M, seldom do we see such overwhelming evidence of guilt in a contested case. Except for that attempted murder of Ms. M, we have no doubt whatsoever of the appellant's guilt. Assignments of Error I, V, IX, and XI are therefore without merit.

Assignment of Error II, which pertains to the alleged attempted murder of Ms. M, does have merit. The Government alleged and attempted to prove that the appellant, by a theory of vicarious liability, attempted to commit what is commonly referred to as felony-murder[28] during the rape of Ms. M when one of the appellant's partners-in-crime kicked her over a cliff (in actuality a 15-foot-deep ravine).

Although the issue was not raised at trial or before this court, we have concerns about the viability of a charged offense of attempted felony murder. Felony murder, a violation of Article 118(4), UCMJ, 10 U.S.C. § 918(4) requires no intent to kill. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.), Part IV, ¶ 43b(4) [hereinafter MCM]. However, attempted murder, a violation of Article 80, UCMJ, 10 U.S.C. § 880, and as correctly instructed by the trial judge in this case, requires a specific intent to kill. *See* MCM, Part IV, ¶4b; *United States v. Roa*, 12 M.J. 210, 212 (C.M.A. 1982). These two concepts conflict.

We have been unable to find any reported military cases recognizing the crime of attempted felony-murder, an attempted Article 118(4), UCMJ, 10 U.S.C. § 918(4) violation. However, in *United States v. Ruffin*, 46 M.J. 657 (N.M.Ct.Crim.App. 1997), we

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[28] We use the term "felony murder" even though military jurisprudence does not use the terms misdemeanor or felony.

held that there is no such offense as an attempted Article 118(3), UCMJ, 10 U.S.C. § 918(3) offense. An Article 118(3), UCMJ, 10 U.S.C. § 918(3) offense, like the Article 118(4), UCMJ, 10 U.S.C. § 918(4) offense, also requires no intent to kill. Following the rationale of *Ruffin*, we would conclude that there is no such offense as attempted felony-murder. However, we need not resolve that issue here. Instead, we conclude more fundamentally that the evidence does not establish attempted murder under any theory because we are not convinced beyond a reasonable doubt that there was the requisite intent to kill Ms. M.

Factually, the kicking of Ms. M into a ravine was the last brutal act in a series of truly horrific crimes committed against her that night. The appellant and another Marine named Duncan had already battered, indecently assaulted, kidnapped, repeatedly raped and sodomized Ms. M, and forced her to sodomize them.

When the appellant and Duncan finally were finished with their sexual attacks on Ms. M, Duncan kicked her, causing her to fall over the edge of, then slide down, a 15-foot ravine (alleged as a cliff). Although the appellant was not with Duncan and Ms. M when she was kicked into the ravine, his criminal responsibility properly resulted from his being an aider-and-abetter and co-conspirator, and not the perpetrator. *See* Art. 77 and 81, UCMJ, 10 U.S.C. §§ 877 and 881; MCM, Part IV, ¶¶ 1 and 5. We have no quarrel with that theory. However, the facts do not support a conviction for attempted murder.

The appellant, Duncan, and a third Marine named Miller, were driving around off-base late one night, searching unsuccessfully for victims to rob. The appellant was armed with a loaded pistol. Duncan had a large unopened bottle of beer in his possession and intended to use it as a weapon.

Shortly before midnight, the three Marines finally spotted a young woman (Ms. M) and her male companion sitting together on

an otherwise empty public beach. The Marines parked their vehicle in the beach lot and Miller, the driver, remained with the vehicle. The appellant and Duncan left the vehicle and walked past Ms. M and her male companion. The appellant had his loaded pistol and Duncan carried the unopened bottle of beer inside a paper bag. The appellant and Duncan then walked directly back to Ms. M and her friend. Without any warning, Duncan struck Ms. M's male friend on the head with the bottle of beer. The force of the blow was so great that the bottle shattered. Duncan then began a violent physical attack on the male, beating and kicking him.

Simultaneously, the appellant immediately pointed his loaded pistol at Ms. M, forced her towards the water-line, and ordered her to remove her clothing.

A young man who had been sitting in his car with his pregnant wife when the appellant's group parked their vehicle, saw Ms. M's friend being beaten and approached to investigate. Duncan saw the young man, pretended that he had a pistol behind his back, and warned that witness to stay away. At the same time, the appellant also saw the witness, aimed his pistol directly at him, and fired one shot at the young man. Luckily, the witness was not hit, but he heard the shot, ran back to his car, and sped away.

While Duncan beat and kicked Ms. M's male companion, the appellant forced Ms. M to a more hidden location and began raping her. Duncan soon arrived and forced Ms. M to perform oral sodomy on him while she was being raped by the appellant. The appellant then forced Ms. M into the waiting vehicle and the three Marines sped off, kidnapping Ms. M.

While in the vehicle, Ms. M was raped and anally sodomized by Duncan, forced to perform oral sodomy on the driver, and indecently assaulted by the appellant.

Ms. M was threatened with death several times by the

appellant and Duncan while at the beach area and in the vehicle if she refused or failed to comply with their demands.

The Marines drove to a remote public park and the appellant and Duncan forced Ms M to a dark, secluded area. She was raped and anally sodomized again by both the appellant and Duncan and forced to simultaneously perform oral sodomy on both of those Marines. The appellant then returned to the vehicle and Duncan forced Ms. M to perform oral sodomy on him one last time. When he was finished with her, Duncan kicked Ms. M, causing her to fall into, and then slide down, a 15-foot-deep ravine. The slope of the side of that ravine was later estimated as moderate to severe (about 45 degrees to about 70 degrees). However, the Government presented no evidence that the appellant, Duncan, or Ms. M knew how deep the ravine was or how steep the side of the ravine was before Ms. M was kicked, causing her to fall into the ravine, and there is no evidence that Duncan told Ms. M that she was about to die as he kicked her or any other direct evidence that Duncan, the appellant, or Miller intended to kill Ms. M.

In his findings instructions, the trial judge required the members to find that Duncan's act of kicking Ms. M was done with the specific intent to kill her. In his findings argument, the trial counsel contended that the only reason Duncan would have kicked Ms. M, causing her to go into the ravine after she had been subjected to the rapes and sodomies, would be to kill her. Then and now, we find such an argument speculative, misleading, inaccurate, and unpersuasive.

Despite the repeated conditional threats to kill Ms. M earlier that evening if she failed to comply with their demands, we are not convinced beyond a reasonable doubt that Duncan or the appellant actually intended to kill Ms. M. Instead, when he kicked her, we conclude that Duncan was subjecting Ms. M to one final indignity after her night of terror by discarding her as no longer of any sexual use to the Marines. Although we hold that the appellant

is not guilty of the charged offense of attempted murder of Ms. M, we are convinced beyond any doubt that the appellant is guilty of the lesser included offense of aggravated assault. Corrective action will be addressed in our decretal paragraph.

In Assignment of Error III, the appellant contends that the trial judge committed prejudicial error by denying the appellant's timely motion to sever the offenses relating to Ms. M from those relating to Ms. R. We hold that the trial judge's ruling on the motion was correct.

In addition to the many terrible crimes described above pertaining to Ms. M, the appellant was also charged with kidnapping, raping, sodomizing, and attempting to murder another young woman, Ms. R. As is customary in severance motions, the appellant contended that, absent severance of the allegations regarding these two victims, the members would likely improperly convict the appellant of all offenses even if the evidence only supported the appellant's guilt with respect to one of the victims. The trial defense counsel contended specifically that the evidence regarding Ms. R was extremely weak, especially as compared to the evidence regarding Ms. M. The defense counsel argued that if the members were convinced that the appellant committed the offenses against Ms. M, they would be likely to conclude that the appellant was a very bad person and probably convict on the offenses involving Ms. R, even if the evidence was deficient. Additionally, the appellant argued that if the two events were not severed, the members would be hopelessly confused by the evidence. Based upon the facts of this case and because of the extraordinary prophylactic measures taken by the trial judge to prevent a spillover problem, we hold that there was no possibility of prejudice in trying all the offenses together.

Traditionally, in military practice, all known charges against a servicemember are tried together at a single court-martial. *See* RULE FOR COURTS-MARTIAL 307(c)(4), MANUAL FOR

COURTS-MARTIAL, UNITED STATES (1995 ed.) [hereinafter R.C.M.]; R.C.M. 601(e)(2) and the discussion following that rule; the discussion following R.C.M. 906(b)(10); and *United States v. Silvis*, 31 M.J. 707, 709 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 135 (C.M.A. 1991). There is a single exception to that rule. To justify severance, the charged servicemember must meet the very heavy burden of establishing that a manifest injustice would result from trying the offenses together. R.C.M. 906(b)(10); *Silvis*, 31 M.J. at 709.

About 45 days before Ms. M was brutally attacked, Ms. R was hitch-hiking alone late one evening in the same general area. The appellant and a person we conclude to be Duncan drove past Ms. R, spotted her, made a U-turn, and offered her a ride. The appellant was driving. Duncan was in the front passenger seat in the two-door vehicle. Duncan allowed Ms. R into the back seat. The appellant then drove off and both Marines pushed their seats towards the rear seat. Ms. R was thus effectively trapped in the rear seat. Instead of dropping Ms. R off where she requested, the appellant ran a stop sign and headed away from the requested drop-off point. Ms. R knew immediately that she was in serious trouble and asked to be let out of the car. The appellant and Duncan refused. Ms. R then begged to be let out, indicating that she was a mother of a small child. Her request was again refused. Ms. R then attempted to kick out a rear window to attract attention. For those efforts, Duncan punched her in the face. Ms. R then began to pray.

When the vehicle arrived at a more remote location, Ms. R was forced to orally sodomize Duncan while the appellant raped her. Ms. R was then dragged from the vehicle, beaten, and kicked. The physical assault on her was so savage that Ms. R concluded that she had to go limp and feign death in order to survive. She did, but was subsequently kicked at least twice more in the head. Ms. R simply let her head flop with each kick, hoping that her attackers would believe her to be dead.

The appellant and Duncan then returned to the vehicle and drove directly towards Ms. R, who was still lying on the ground. Ms. R was conscious enough to see the car coming towards her and feared that she was going to be run over. She was able to roll out of the way and run to a near-by house for help. Just as Ms. M had done, Ms. R, without any hesitation, made a positive in-court identification of the appellant as one of her attackers.

Ms. R's credibility was attacked by the appellant because of evidence that she had abused methamphetamines for the previous 8 years, had used that substance early in the morning of her attack, and had ingested the drug earlier in the day she testified. Ms. R also admitted to what appears to have been an unrelated misdemeanor conviction.

Contrary to the claims made by the appellant at trial and to this Court that the case involving Ms. R was very weak, we conclude that the evidence of the appellant's guilt regarding both victims is strong. His is not a case in which members might have used spillover to convict on all offenses. In fact, the members' findings rebut the appellant's assertion that spillover from the stronger case involving Ms. M would lead to conviction on all the offenses regarding Ms. R. Although we have concluded that the evidence supporting the charge of attempted murder of Ms. R is very strong, the members found the appellant not guilty of that charged offense but guilty only of a lesser included offense. We have also concluded that the evidence of attempted murder of Ms. M is fatally deficient, yet the members were convinced beyond a reasonable doubt that the appellant committed that offense. These are indicators to us that spillover did not control the members at all.

Because the offenses against the two women were separated by about 45 days, and because the evidence was so very clear with respect to each victim, we see no possibility of confusion on the part of the members or a spillover problem.

We reach this conclusion also because of the extraordinary and commendable prophylactic measures taken by the trial judge to ensure that the appellant was not prejudiced by trying the offenses together. In his preliminary instructions before any evidence was presented, *see* R.C.M. 913(a), the trial judge cautioned the members to keep the offenses regarding the two women victims separate. The appellant was permitted, during *voir dire*, to explore the issue of spillover. The trial counsel was required to bifurcate his opening statement, presentation of evidence on the merits, and findings argument so that the cases involving each woman were clearly distinguished and compartmentalized. At the close of the presentation of the Government's evidence pertaining to Ms. M, and before any prosecution evidence relating to Ms. R was offered, the trial judge again provided a cautionary spillover instruction. Finally, in his findings instructions, the trial judge once again provided a good spillover instruction.

We conclude that there was no possibility of prejudice from trying all the offenses together. The trial judge correctly denied the severance motion. Assignment of Error III is without merit.

In Assignment of Error IV, the appellant contends that the trial judge erred by not granting his request for a neurological examination.

Prior to trial and pursuant to R.C.M. 706, the appellant was examined by a Navy psychiatrist, who concluded that the appellant had the mental capacity to stand trial and that, at the time of the alleged offenses, the appellant had no severe mental disease or defect. He therefore concluded that the appellant was mentally responsible at the time of the alleged offenses. The Navy psychiatrist was also of the opinion that, at most, the appellant merely had a personality disorder.

The trial defense counsel then asked the convening

authority to direct neurological testing of the appellant to determine if there was any physical (as opposed to purely mental) defect that rendered the appellant unable to assist in his defense. The request referred in detail to the appellant's entire medical history, including the fact that his mother smoked marijuana while pregnant with the appellant, childhood physical and emotional trauma, and his recent irrational and unusual behavior. The trial defense counsel did not ask that the issue of mental responsibility be revisited. The convening authority denied the request for neurological testing.

At trial, the appellant orally moved that the trial judge order the neurological examination. The trial defense counsel referred to the same detailed medical history and recent irregular behavior as was in his request to the convening authority. The trial defense counsel also referred to an article in a psychiatric journal and suggested that the appellant might suffer from a medical condition that would result in him being unable to determine right from wrong. Even though the request made to the convening authority only addressed the appellant's capacity to stand trial, and even though the oral motion expressly addressed only a concern about mental capacity, the trial defense counsel soon expanded his concerns to also include the issue of mental responsibility.

The trial judge directed that the Navy psychiatrist reconsider his earlier R.C.M. 706 conclusions regarding mental capacity and responsibility after considering the appellant's complete medical history and recent irrational behavior as provided by the trial defense counsel. *See* R.C.M. 706(c)(4). The trial judge also directed that the Navy psychiatrist conduct any neurological testing he believed necessary. The Navy psychiatrist subsequently indicated that although he conducted neurological testing for some R.C.M. 706 examinations, such testing was not medically warranted in the appellant's case. The Navy psychiatrist's ultimate conclusions regarding mental responsibility and capacity did not change after considering the material offered by the appellant. The trial judge then declined to order neurological testing.

Lack of mental responsibility was offered as a defense to the crimes committed against Ms. M and her male companion. *See* Art. 50a, UCMJ, 10 U.S.C. § 850a ; R.C.M. 701(b)(2), 916(k). An experienced clinical psychologist testified as a defense expert and indicated that, because of at least one severe mental disease or defect, the appellant lacked mental responsibility for those offenses but had the mental capacity to stand trial. The defense expert also concluded that the appellant had no personality disorder. Although the defense expert testified at length about the many psychological tests she had administered to the appellant, she did not indicate a need for neurological testing or that she had conducted such testing on the appellant.

In effect, the appellant had two R.C.M. 706 examinations prior to trial on the merits, both resulting in the same conclusions regarding mental capacity and responsibility. Except for the article from the medical journal, the appellant presented no evidence to rebut the conclusion of the Navy psychiatrist that neurological testing was unwarranted in this case. The appellant therefore failed to establish that neurological testing was necessary. All the appellant did was make a bald assertion that such testing should be done. The trial judge did not err in not ordering such testing. Assignment of Error IV is therefore without merit.

Assignment of Error VII is without merit. We need not comment on this assigned error, except to state that the record clearly supports two entirely separate conspiracies on 24 July 1994.

Assignment of Error VIII, contending that plain error resulted when the trial counsel was permitted to use leading questions during his examination of Ms. R, is also without merit. No leading questions were posed by the trial counsel to Ms. R during her direct examination and there was not a single objection to any of those questions. Arguably, there was just one leading question posed during redirect. There was an objection that the

question was leading and the trial counsel rephrased his question. The trial judge did not rule on the objection. The appellant has failed to carry his burden of establishing plain error, *United States v. Olano*, 507 U.S. 725 (1993), first, because we find no error, and second, even assuming error, we find no plain error as that term is defined by *Olano*. We also can find no prejudice.

Assignment of Error X requires no comment other than to note that it has absolutely no merit.

In Assignment of Error VI, the appellant contends that his sentence to confinement for 40 years is inappropriately severe. We disagree. After considering the nature and circumstances of the terrible crimes committed by the appellant; all the defense evidence relating to the appellant's character, medical history, and childhood; and even the post-trial clemency material, we conclude that the sentence is most certainly not inappropriately severe.

The appellant's crimes are extraordinary because of their savageness and brutality. Ms. M and Ms. R had to endure nightmarish, almost unspeakable terror at the hands of this appellant. No person should have to endure what these two victims went through. The power to grant clemency lies in the hands of the members and convening authority, not ours. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988). Even if we had the power to grant clemency, we certainly would not do so in this case. Our mandate under Article 66(c), UCMJ, 10 U.S.C. § 866(c), is to ensure that an approved sentence is appropriate: correct in law and fact and one that should be affirmed. Sentence appropriateness is based upon the concept of ensuring that justice is done and that an accused gets no more than the punishment he or she deserves. *Healy*, 26 M.J. at 395. The appellant's approved sentence falls into that category.

Accordingly, the finding of guilty for Specification 2 under Additional Charge I (attempted murder of Ms. M) is set aside. We

substitute therefor a finding of guilty to an Article 128, UCMJ, 10 U.S.C. § 928 lesser included offense of aggravated assault with a means or force likely to produce grievous bodily harm (kicking Ms. M into a ravine). All other guilty findings are affirmed. Taken out of context, setting aside a guilty finding to attempted murder would tend to lead us towards a sentencing rehearing. However, under the unique facts of this case, where that attempted murder finding was only a small part of the case, and after applying the principles of *United States v. Dresen*, 40 M.J. 462, 464 (C.M.A. 1994); *United States v. Jones*, 39 M.J. 315, 317 (C.M.A. 1994); *United States v. Peoples*, 29 M.J. 426 (C.M.A. 1990); and *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), we reassess. After doing so, we have no difficulty affirming the sentence approved below.

WILLIAM J. LUCAS

Judge GRANT and Judge OLIVER concur.

W.F. GRANT

JOHN T. OLIVER